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Publication Date - 2000-04-03

INTERNATIONAL COMPARATIVE ANALYSIS OF PRIVATE RIGHTS OF ACCESS

A STUDY COMMISSIONED BY
INDUSTRY CANADA
COMPETITION BUREAU

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TABLE OF CONTENTS

Introduction
Executive Summary

AUSTRALIA

Introduction
I. Private Actions: Overview

- 1(a) **Conduct Actionable by Private Parties**
- 1(b) **In Practice, the Kinds of Actions Private Parties Tend to Bring**
- 1(c) **Where Private Actions are Commenced**

- 1(d) Relative Number of Private to ACCC Actions
- 1(e) Length of Time Private Action in Place

II. Standing to Sue

- 2(a) Standing to Initiate a Private Action
- 2(b) Criteria Applied to Determine Standing

III. Remedies

- 3(a) Remedies Available to Private Litigants
  - (1) Injunctions
  - (2) Divestiture Orders
  - (3) Damages
  - (4) Representative, or Class, Actions
  - (5) Declarations
- 3(b) Remedies Available to the ACCC
  - (1) & (2) Civil Injunctions & Divestiture Orders
  - (3) & (4) Damages and Representative Actions
  - (5) Pecuniary Penalties
  - (6) Orders Prohibiting Managing Corporations
  - (7) Administrative Enforcement
- 3(c) Interim Remedies
- 3(d) Are Damages Awarded
- 3(e) Cost Awards in Private Actions
- 3(f) Comparison With Cost Awards in Public Actions

IV. The Role of the ACCC in Private Actions

- 4(a) Power to Bring Representative Actions
- 4(b) Right of Intervention in Private Actions
- 4(c) Takeover of Private Actions
- 4(d) Power to Confer Immunity - Exclusive Dealing Notifications
- 4(e) Power to Confer Immunity - Authorizations
- 4(f) Policy of ACCC Re Leaving Cases to Private Action
- 4(g) Availability of ACCC-Collected Information to Private Parties

V. Case Management and Efficiency of Proceedings

- 5(a) Caseflow Management
- 5(b) Alternative Dispute Resolution (ADR)
- 5(c) Consent Orders
- 5(d) Summary Judgment
- 5(e) Efficiency vs. Quality of Justice
- 5(f) Experience of the Federal Court with Private Actions

    - 5(g) Contribution of Private Actions to Competition Jurisprudence

NEW ZEALAND

- Introduction
- I. Private Actions: Overview
    - 1(a) Conduct Actionable by Private Parties
    - 1(b) In Practice, the Kinds of Actions Private Parties Tend to Bring
    - 1(c) Where Private Actions Are Commenced
    - 1(d) Relative Number of Private to Commerce Commission Actions
    - 1(e) Length of Time Private Action in Place
- II. Standing to Sue
    - 2(a) Standing to Initiate a Private Action
    - 2(b) Criteria Applied to Determine Standing
- III. Remedies
    - 3(a) Remedies Available to Private Litigants
        - (1) Injunctions
            - (a) General
            - (b) Interim Injunctions
            - (c) Permanent Injunctions
        - (2) Divestiture Orders
        - (3) Damages
        - (4) Class Actions
        - (5) Declarations
        - (6) Other Orders
    - 3(b) Remedies Available to the Commerce Commission
        - (1) Interim, Permanent and Mandatory Injunctions
        - (2) Cease and Desist Orders
        - (3) Pecuniary Penalties
        - (4) Orders Prohibiting Managing Corporations
        - (5) Divestiture Orders
        - (6) Administrative Enforcement
    - 3(c) Are Damages Awarded
    - 3(d) Cost Awards in Private Actions
    - 3(e) Comparison with Costs Awarded in Public Actions
- IV. The Role of the Commerce Commission in Private Actions

- 4(a) Power to Bring Representative Actions
- 4(b) Right of Intervention in Private Actions
- 4(c) Takeover of Private Actions
- 4(d) Power to Confer Immunity - Authorizations and Clearances
- 4(e) Policy Re Leaving Cases to Private Action
- 4(f) Availability of Commerce Commission Information to Private Parties

V. Case Management and Efficiency of Proceedings

- 5(a) Caseflow Management vs. Quality of Justice
- 5(b) Experience in High Court with Private Actions
- 5(c) Contribution of Private Actions to Competition Jurisprudence

UNITED KINGDOM

Introduction
I. Private Actions: Overview
II. The Role of the Office of Fair Trading in Private Actions
III. Case Management and Efficiency of Proceedings

IRELAND

Introduction
I. Private Actions: Overview
II. Standing to Sue & Remedies

- 2(a) Standing to Sue
- 2(b) Remedies

III. The Role of the Competition Authority in Private Actions

- 3(a) Power to Intervene, Etc., Representative Actions
- 3(b) Power to Confer Immunity for Legal Proceedings
- 3(c) Policy Re Leaving Cases to Private Action
- 3(d) Availability of Competition Authority Information to Private Parties

IV. Case Management and Efficiency of Proceedings

UNITED STATES

Introduction
I. Private Actions: Overview

- 1(a) Conduct Actionable by Private Parties
- 1(b) In Practice, the Kinds of Actions Private Parties Tend to Bring
  - (1) Generally

        - (2) Elapsed Time Between Initiation and Resolution
        - (3) Proportion Resulting in Consent Orders, Settlements, Etc.
            - (a) General Settlement Rates
            - (b) Specific to Tied Selling & Refusal to Supply
    - 1(c) Where Private Actions Are Commenced
    - 1(d) Relative Number of Private to Public Actions
    - 1(e) Length of Time Private Action in Place
- II. Standing to Sue
- III. Remedies
    - 3(a) Remedies Available to Private Litigants
        - (1) Treble Damages
        - (2) Interim and Permanent Injunctions
        - (3) Class Actions
    - 3(b) Remedies Available to the United States
        - (1) Criminal Prosecution
        - (2) Damages
        - (3) Injunctions & Divestiture Orders
        - (4) Consent Decrees
        - (5) Cease and Desist Orders
        - (6) Civil Penalty for Violating Cease and Desist Orders
        - (7) FTC Temporary Restraining Orders, Etc.
        - (8) Administrative Enforcement
            - (a) Justice Department
                - (1) Corporate Leniency Policy
                - (2) Individual Leniency Policy
                - (3) Business Review Letters
            - (b) Federal Trade Commission
                - (1) Administrative Consent Orders
                - (2) Advisory Opinions
                - (3) Trade Regulation Rules or Guidelines
            - (c) Coordination Between FTC and Antitrust Division
    - 3(c) Damage Awards
    - 3(d) Cost Awards
    - 3(e) Comparison with Costs Awarded in Public Actions

IV. The Role of the United States in Private Actions

- 4(a) Power to Bring Representative Actions
- 4(b) Right of Intervention in Private Actions
- 4(c) Power to Confer Immunity from Legal Proceedings
- 4(d) Policy of the United States Re Leaving Cases to Private Action
- 4(e) Assistance to Private Parties

V. Case Management and Efficiency of Proceedings

- 5(a) Caseflow Management and Alternative Dispute Resolution
- 5(b) Amendments to Discovery Rules
- 5(c) Summary Judgment, Groundless Litigation, & Offers of Settlement
- 5(d) Experience in the Courts with Private Antitrust Actions
- 5(e) Contribution of Private Actions to Antitrust Jurisprudence

COMPARATIVE ANALYSIS

- Introduction
- I. Enforcement Philosophy
- II. Extent of Cooperative Enforcement

- (1) Information Sharing
- (2) Other Forms of Cooperation

III. The Distribution of Enforcement Power Between the Public and Private Sectors
IV. Prohibitions Most Suitable to Private Enforcement
V. Focus of Public Enforcement Activity
VI. Cost Reduction in Private Enforcement

- (1) In General
- (2) Antitrust -Specific Cost Reduction

VII. Governmental Oversight of Private Actions

- (1) Intervention
- (2) Immunization from Legal Proceedings

VIII. Preventing Strategic Use of Private Actions for Anticompetitive, Etc., Purposes
IX. Design Guidance: Effectiveness of Private Enforcement

- (1) Detection
- (2) Deterrence
- (3) Compliance
- (4) Compensation
- (5) Guidance to the Business Community

INTRODUCTION

The Competition Bureau requested me to provide the Commissioner of Competition with a written study comparing international practices and experience in the private enforcement of competition legislation. I was advised that the purpose of the study was to provide a guide for the appropriate design of a private right of access to the Competition Tribunal.

Five jurisdictions were selected to be studied: Australia, New Zealand, the United Kingdom, Ireland, and the United States. It was contemplated that the experiences with private actions in these jurisdictions would not only yield valuable insights into the types of anticompetitive conduct best suited to enforcement through the private sector, but also the causes of action and remedies that seemed most appropriate for private actions. In addition, it was anticipated that these jurisdictions' experiences would provide insights into safeguards, incentives and procedures needed to avoid frivolous or strategic litigation and resolve cases quickly and efficiently.

As envisioned by the Bureau, the study was to be structured as follows: It would have six chapters -- one for each of the five jurisdictions, and a final chapter making a comparative analysis of their laws, practices and experience relating to private enforcement. It was thought, with some justification as it turns out, that from the comparative analysis there would emerge a number of lessons to be learned to assist in the design of an efficient and effective private right of access to the Competition Tribunal.

The study herein not only honours the structure suggested by the Bureau, but also attempts in each of the chapters for the five jurisdictions to answer as completely as possible several specific questions posed by the Bureau. The questions called, inter alia, for information upon: the types of conduct actionable by the public and private sectors; kinds of actions actually filed; numbers of actions initiated by each sector; standing to sue; duration and cost of private actions; range of remedies available to the public and private sectors; availability of damage awards; practices re cost awards; relative success of private actions; means for public sector control of private litigation; governmental policies re leaving cases to private action; availability to private parties of investigation information; availability of case management procedures; use of other mechanisms to control strategic or frivolous litigation; and, the contribution of private actions to the development of competition law. Unless otherwise indicated, the study is current to June 1999.

The chapters on the five jurisdictions were structured to provide information in response to these questions as efficiently as possible. The Comparative Analysis chapter and the Executive Summary, however, follow a structure better suited to accommodate the flow of the analysis.

Table of Contents

EXECUTIVE SUMMARY

The comparative analysis in the study has yielded the following results, which may be of considerable use in the design of a private right of access to the Competition Tribunal:

(1) Enforcement Philosophy:

While all of the jurisdictions in the study, except the United Kingdom, regard private actions as a desirable supplement to public enforcement, Australia and New Zealand have moved toward adopting a philosophy of cooperative enforcement in which the private sector is granted a larger role in protecting the public interest.

(2) Extent of Cooperative Enforcement:

Even in New Zealand, however, which has gone the farthest in this direction, cooperative enforcement has not advanced much beyond granting open standing to sue for injunctive relief and proposing to require the courts to give weight to the interests of all consumers in private interim injunction applications. There has been little cooperation in any of the jurisdictions in providing private access to information gathered in public investigations.

Most of the jurisdictions in the study provide some assistance to private parties who wish to file follow-on actions after the successful completion of a public sector case. The assistance usually takes the form of giving prima facie effect to the evidence or judgment of the court in the public sector action.

(3) The Distribution of Enforcement Power Between the Public and Private Sectors:

The distribution of enforcement power is heavily weighted toward the public sector, primarily in its more formidable and far-reaching remedies and extensive administrative authority. In all jurisdictions, the public sector is empowered to recover formidable criminal or civil pecuniary penalties from violators. In every jurisdiction but Australia, which has a minor exception with respect to mergers, the same holds true for the power to obtain orders directing steps to be taken to restore competition, up to and including dissolution and divestiture. Finally, only the public sector has an established array of administrative powers. The United States and the United Kingdom include among these the power to issue cease and desist orders. New Zealand is proposing to do the same. The United Kingdom has even gone farther, granting the Director of the Office of Fair Trading the power to impose pecuniary penalties.

(4) Prohibitions Most Suitable to Private Enforcement:

Private actions have been found to be most useful in addressing anticompetitive conduct that:

1. Has an impact upon market participants that they can readily detect; and,
2. May be satisfactorily dealt with by obtaining interim or permanent injunctive relief.

This includes conduct which aims to exclude current or potential competitors and has an obvicus economic impact upon them. Tied selling , exclusive dealing and refusal to deal would appear to be among the types of conduct that fit within these criteria. From the available data, they make up at least 40-50% of the private actions that are filed.

(5) Focus of Public Enforcement Activity:

In Australia, New Zealand, and the United States, public enforcement has become increasingly focused upon hard-core cartel activity, which includes price fixing, bid rigging, output limitation agreements and horizontal market division. These types of anticompetitive conduct are usually attended by a great deal of secrecy and are more successfully detected and remedied through public action. In the United States, detection rates have increased substantially as a result of its amnesty program. New Zealand is considering following suit.

Enforcement criteria published by some jurisdictions, such as Australia, New Zealand and Ireland, indicate that consideration of several additional factors might prompt public action in other areas. These factors include impact upon competition; deliberateness of the violation; potential precedential value of a decision; and, the absence of a private party with sufficient resources to address the conduct in a private action.

(6) Cost Reduction in Private Enforcement:

In most jurisdictions, efforts to reduce the duration and cost of litigation have taken place within the broader context of all complex civil litigation. Competition cases have been recognized as among the most complex in the judicial system. The courts in Australia, New Zealand, United Kingdom and the United States have taken or are taking several steps to help resolve the problems of duration and cost. These steps primarily involve the adoption of stringent caseflow management systems, including references to alternative dispute resolution, and streamlined discovery rules. The costs indemnity rule, which applies in all jurisdictions in the study but the United States, remains unchanged.

The only jurisdictions to propose specific cost-reduction measures for antitrust cases were Australia and New Zealand. The Australian Law Reform Commission proposed legislative changes to ensure that the Australian Competition and Consumer Commission was empowered to bring representative, or class, actions on behalf of small businesses and consumers. It also proposed to ensure that representative actions were available to permit consumer and business organizations to sue on behalf of their memberships. New Zealand proposed to alleviate the disincentives to public and private interim injunction actions by empowering the Commerce Commission to issue cease and desist orders.

(7) Governmental Oversight of Private Actions:

Of all of the jurisdictions in the study, only Australia expressly empowered its competition authority, the Australian Competition and Consumer Commission, to intervene in and even take over private actions. These powers have seldom, if ever, been used. The United States grants the public sector the right to intervene as *amicus curiae*, or "friend of the court" in appeals of private antitrust decisions. It only does so when there is a clear legal issue upon which the government wishes to be heard.

Every jurisdiction in the study except the United States empowers their competition authorities to immunize anticompetitive conduct from legal proceedings, so long as the conduct provides public benefits that outweigh its anticompetitive effects. These powers, however, have been little used to deprive potential private plaintiffs of their causes of action.

(8) Preventing Strategic Use of Private Actions for Anticompetitive, Unmeritorious or Frivolous Purposes:

Virtually every jurisdiction in the study recognizes that measures to improve antitrust enforcement through private actions must not, at the same time, permit the private sector to use the actions strategically for anticompetitive or unmeritorious purposes. This is the reason why Australia eliminated the private right of action for injunctive relief in merger cases. For this reason, too, New Zealand rejected the idea of turning to treble damage actions.

As it now stands, however, the courts of the various jurisdiction appear to be well equipped to deal with frivolous, unmeritorious or strategic litigation. They have at their disposal a wide variety of mechanisms to be used in filtering out such claims. The mechanisms range from mild procedural devices, like summary judgment, to harsh disciplinary responses, such as punitive cost orders.

(9) Design Guidance: Effectiveness of Private Enforcement:

Of the five key areas of enforcement -- detection, deterrence, compliance, compensation and business guidance -- private actions have been found to be most useful in the areas of detection, compliance and business guidance. They are particularly useful in the detection of anticompetitive conduct having an immediate impact upon market participants, such as tied selling, exclusive dealing and refusal to deal. Provided that interim injunctive relief or cease and desist orders can be made available on a relatively cheap, expedited basis, private actions can be effective in achieving compliance with competition law in these areas. Finally, despite their shortcomings in the areas of deterrence and compensation, private actions have provided valuable guidance to the business community by helping to develop fundamental aspects of competition law in Australia, New Zealand, and the United States.

Table of Contents

AUSTRALIA

Introduction:

The general competition law of Australia is found in the restrictive trade practices provisions of Part IV of the Trade Practices Act (the Act).[1]Under the Act, private parties are entitled to sue for contraventions of these provisions in the Federal Court of Australia. Over the past twenty five years, private actions have made a substantial contribution to the development of Australian competition law.

The Act does not provide private parties with the same incentive to sue as the antitrust laws of the United States. As in most Commonwealth countries, private litigants are liable to pay the costs of the prevailing party. U.S.-style treble damages are not available. Private parties are limited to seeking single damages, declarations or injunctive relief. In merger cases, divestiture orders are available; however, injunctive relief is not. The preferred remedy of most private parties in Australia appears to be injunctive relief.

Class actions are also available to private parties. The representative action provisions of the Federal Court Act permit private parties to file class actions for, inter alia, trade practice contraventions, so long as seven or more persons have claims raising a substantial common issue of law or fact.

The activities of private parties in enforcing the trade practices provisions of the Act are complemented by those of the Australian Competition and Consumer Commission (ACCC). In 1995, the ACCC absorbed the Trade Practices Commission (TPC), which until then had enforced the trade practices provisions of the Act. The ACCC has a number of enforcement tools available to it, which include seeking court-enforceable undertakings, pecuniary penalties, civil injunctions, and divestiture orders. The ACCC also might arguably have the power to file representative, or class, actions seeking damages on behalf of small businesses or consumers.

The ACCC has a statutory right to intervene in most private actions, but this right seldom has been used. It also has the power to confer immunity from legal proceedings, including private actions, by means of devices called notifications or authorizations. Defendants in private actions, however, have not resorted to using these devices to escape their potential liability.

In deciding whether to pursue a particular matter or leave it to private action, the ACCC is influenced by several factors, including the potential for the action to become a significant deterrent; the promotion of compliance with the Act; and, the potential for achieving redress for those adversely affected by the conduct in question. The ACCC, however, does not readily share with private parties the information it may have collected in its investigations. Private parties must pursue the information using freedom of information requests or subpoenas.

The Federal Court of Australia has adopted several caseflow management procedures to minimize delays in litigation and provide parties with early hearing dates. It also has several specialist panels, including a specialist Competition Law Panel, to help speed the processing of competition cases. The goal of the Federal Court is to dispose of 98% of its cases within 18 months of commencement of proceedings. It seems to be recognized, however, that because competition cases are among the most complex proceedings to be dealt with by the court, the goal may not be achievable in this area.

Table of Contents

I. Private Actions: Overview:

1(a) Conduct Actionable by Private Parties:

Under the Act, private actions are available for breaches of Parts IV (Restrictive Trade Practices), IVB (Industry Codes) and V (Consumer Protection) of the Act.[2] Part IV, which contains the competition provisions of the Act, prohibits the following restrictive trade practices:

Practice	Section(s)	Per se Illegal?[3]
1. Agreements substantially lessening competition	45, 45B	No
2. Agreements with exclusionary covenants (Group Boycotts)	45, 45D	Yes
3.(I) Horizontal Price Fixing Agreements Re Goods or Services	45, 45A	Yes
(ii)Exceptions from per se illegality:		
(1) Joint Venture Pricing	45, 45A(2)	No
(2) Price Recommendations	45A(3)	No
(3) Buying Groups	45A(4)	No
4. Secondary Boycotts by Trade Unions	45D & E	No
5. Misuse of Market Power (Abuse of Dominance)	46, 46A	No
6. Exclusive Dealing		No
7. Third Line Forcing (Tied Selling)	47(7) - (9)	Yes
8. Resale Price Maintenance Re Goods	48, Part VIII	Yes
9. Price Discrimination Re Goods	49	No
10.Mergers	50, 50A	No

The bulk of these restrictive trade practices roughly correspond to those covered in the competition provisions of the Canadian Competition Act.[4]

Generally, the Act grants private parties the right to sue for injunctive relief and/or damages for contraventions of the above provisions.[5] A private party may sue for injunctive relief in all but merger cases falling under § 50 of the Act. The exclusion for merger cases was enacted in the 1977 revisions to the Act.[6]

Private actions for damages are governed by § 82 of the Act. To be entitled to sue for damages, a private party must have suffered loss or damage as a result of the contravention. Only single damages are recoverable. A three-year statute of limitations in s§ 82(2) prevents recovery of damages incurred more than three years before commencement of the action.

1(b) In Practice, the Kinds of Actions that Private Parties Tend to Bring:

At present, the published literature contains very little information about the kinds of actions that private parties currently tend to bring. The most recent study in this area, the Brunt study,[7]was published in 1990 and analyzed data from the year after proclamation of the Act, 1975, to 1989. It contained the following table showing the number and nature of the causes of action brought by the then Trade Practices Commission (TPC) and private parties from 1975 to 1980:[8]

Table 2 Causes of Action Reported by the TPC 1975-1980

	No. of Cases Relying Upon Designated Cause Of Action			
	Instituted		**Concluded**	
Causes of Actions	TPC	Private Party	TPC	Private Party
§ 45 Price Fixing	7	2	4	1
§ 45 Other Agreements	4	42	3	7
§§ 45D, 45E Secondary (and related) Boycotts	1	37	1	11
§ 46 Monopolization	2	20	1	4
§ 47 exclusive Dealing	4	20	1	4
§ 48 R.P.M.	13	5	11	3
§ 49 Price Discrimination	0	11	0	1
§ 50 Merger	1	2	1	0
Other (unclassified or shot-gun)	0	3	0	0
All Causes	32	142	23	31

The table shows that in the earlier years of the Act, private parties most often tended to bring actions alleging agreements substantially lessening competition, unlawful secondary boycotts[9], monopolization, exclusive dealing, or price discrimination. While the vast majority of these actions were either settled or discontinued, most of the actions that were concluded by decision tended to involve the same practices.

The following table, derived from a brief survey of the *Scaleplus* website of the Australian Government[10], indicates that anti-competitive agreements and exclusive dealing (including third line forcing, i.e., tied selling) now form the subject matter of most decisions in private actions[11].

	Calendar Year										
Practice	**90**	**91**	**92**	**93**	**94**	**95**	**96**	**97**	**98**	**99**	**Total:**
Price fixing	0	1	2	1	0	1	0	1	1	0	7
Agreements substantially lessening competition	5	7	5	5	3	3	5	5	11	0	49
Misuse of market power	0	0	1	2	0	0	1	0	0	0	4
Exclusive dealing	5	5	6	2	6	1	4	3	1	0	33
Third line forcing (a subcategory of ex.deal'g)	1	0	1	0	2	0	1	1	0	0	6
Resale price maintenance	0	1	1	0	1	0	1	1	3	0	8
Price discrimination	4	0	0	1	2	1	0	3	1	0	12
Total Decisions:											**119**

It must be borne in mind that the above table is based upon crude information. It merely reflects the number of interim and final decisions issued by the Federal Court involving causes of action based upon the above practices.[12] It does not include the number of actions that were commenced and later settled, and hence may not be a reliable indicator of all of the practices that private plaintiffs might currently be targeting. The Australian Competition and Consumer Commission (ACCC) and the Australian Law Reform Commission (ALRC) have said, however, that more accurate information may soon become available. Commissioner Sitesh Bhojani of the ACCC recently indicated that a study of the judicial enforcement of Australian competition law was being prepared for the ACCC and likely would be published in March or April, 1999.[13] The ALRC indicated that later in 1999, it would publish a comprehensive study of the adversarial system in Australia that would, inter alia, analyse the progress through the system of a number of private actions under Part IV of the Act.[14]

1(c) Where Private Actions Are Commenced:

Civil actions under the Act, whether by private parties or the ACCC, are commenced in the Federal Court of Australia. Section 86 of the Act provides, in pertinent part, as follows:

> 86(1) Jurisdiction is conferred on the Federal Court in any matter arising under this Act in respect of which a civil proceeding has, whether before or after the commencement of this section, been instituted under this Part. ...

The jurisdiction of the Federal Court is exclusive of the jurisdiction of any other court, except for that of the High Court under § 75 of the Australian Constitution.[15]

1(d) Relative Numbers of Private to ACCC Actions:

The table that was reproduced from the Brunt study in § 1(b) of this paper, supra, shows that in the period 1975 - 1980, private parties instituted from three to four times as many causes of action as the then Trade Practices Commission (TPC).[16] The number of causes of action that were actually concluded by private parties, however, came close to the number concluded by the TPC. The primary focus of the TPC was upon resale price maintenance and price fixing while the private actions focussed upon agreements substantially lessening competition, exclusive dealing and monopolization (misuse of market power).

No similar statistics are available for any more recent period. Our own brief survey of the *Scaleplus* website, however, may provide a crude indication of the litigation activity of the ACCC relative to that of private parties. The survey shows that in the period 1990-99, the following numbers of decisions were issued in causes of action instituted by the ACCC.

Calendar Year

Practice	90	91	92	93	94	95	96	97	98	99	Total
Price fixing	0	3	0	1	3	2	3	4	6	1	23
Agreements substantially lessening competition	0	3	1	5	4	4	4	5	1	1	28
Misuse of market power	0	0	0	0	0	0	0	0	0	0	0
Exclusive dealing	0	0	1	0	0	0	0	0	0	0	1
Third line forcing (a subcategory of ex.deal'g)	0	0	0	0	0	0	0	0	0	0	0

Resale price maintenance	5	3	2	2	4	1	1	3	4	0	25
Price discrimination	0	0	1	0	0	0	0	0	0	0	1
Merger	4	0	4	2	3	0	0	3	0	0	16
Total Decisions:											**94**

The table shows that in the period 1990-99, a total of 94 interim and final decisions were issued in causes of action initiated by the ACCC or its predecessor, the TPC.[17] This compares with a total of 135 interim and final decisions in private actions for the same period.[18] Most decisions in ACCC-initiated cases involved causes of action alleging price fixing, agreements substantially lessening competition, and resale price maintenance.

This mix of decisions does not correspond well with the published enforcement priorities of the ACCC under the restrictive trade practices provisions of Part IV of the Act. These priorities are to focus upon third line forcing, abuse of market power and resale price maintenance.[19] The divergence between our results and the ACCC's published priorities may have resulted from the crude methodology that was employed in the survey of the *Scaleplus* website. Counting the number of decisions issued in a particular area ignores legal proceedings or administrative enforcement initiatives that were concluded before the issuance of any decision.[20]ACCC media releases for calendar year 1998 tend to confirm, however, that price fixing and agreements substantially lessening competition remain a leading concern of the ACCC.[21]What seems most noteworthy in light of the published enforcement priorities of the ACCC is that the litigation of exclusive dealing cases, including third line forcing, seems virtually to have become the province of the private sector. The private sector recorded 33 interim and final decisions involving exclusive dealing as compared to the ACCC's one decision for the same period.

1(e) Length of Time Private Action in Place:

Private actions have been in place in Australia since the Act came into effect in 1974. In fact, the Brunt study noted that:

> The first reported decision under Part IV - Restrictive Trade Practices of the Trade Practices Act 1974 (Cth) ('the Act') was a private action, *Top Performance Motors v. Ira Berk* (1975). The first reported High Court decision was a private action, *Quadramain v. Sevastapol* (1976). The most important judgment to date was yet another private action, *Queensland Wire Industries v. B.H.P.* (1989). In this case the Australian High Court handed down a judgment on 'misuse of market power' (§ 46 of the Act) universally hailed as a landmark decision. ...[22]

Since their inception in 1974, private actions have played a significant role in the development of jurisprudence under the restrictive trade practices provisions of the Act.

Table of Contents

II. Standing to Sue:

2(a) Standing to Initiate a Private Action:

The Act contains two statutory provisions relating to standing to sue. For injunctive relief, § 80(1) of the Act provides for open standing. It "confers power to seek injunctions in all cases other than domestic mergers upon the Attorney General, the ... [ACCC] and 'any other person' -- and the courts have held upon more than one occasion that the phrase means just that."[23]

The Act is more restrictive when it comes to suit for damages. Section 82(1) of the Act restricts standing to sue "to a 'person who has suffered loss or damage by conduct ... in contravention', and the cases ... [require] some causal connection between the conduct constituting the contravention and the loss or damage suffered."[24]

This restriction, however, has been seen to be of minor importance in light of the open standing provision for injunctive relief. It has been noted that injunctive relief is the preferred remedy in private actions under the Act. One Australian authority commented upon this as follows:

It may be that our courts will achieve a similar result to the [American] 'antitrust injury' rule via some doctrine of remoteness. But at the present time, with expected costs and returns falling as they do, the issue is of little importance....[I]n Australia most private applicants are satisfied if they achieve the award of an injunction. The implication is that in these cases the expected dollar value of injunctive relief (unlike a damages award) will outweigh the high cost of litigation....[25]

The prospect of obtaining an award of damages does not appear to be regarded as a significant factor motivating private plaintiffs to bring suit under the Act.

2(b) Criteria Applied to Determine Standing:

As indicated above, § 80(1) provides for open standing to obtain injunctive relief under, inter alia, the restrictive trade practices provisions of the Act. This is far broader than the tests for standing usually applied in private actions for public remedies under the general law and many other Australian statutes, several of which require private parties to show that they have "capacity to represent the public interest" and a "special interest" in the subject matter of the action.

In a 1996 report, the Australian Law Reform Commission (ALRC)[26] sought to refute arguments against liberalizing the law of standing to sue for public remedies by alluding to past experience under, inter alia, § 80(1) of the Act. Referring to submissions that liberalization would open the floodgates to litigation, the ALRC said, "[T]here is no evidence that the open standing provision in the Trade Practices Act 1974 (Cth) has led to a high level of litigation."[27]

The ALRC recommended that all tests for standing to commence and maintain public law proceedings in the general law and almost all statutes should be replaced by a single, more liberal test, which would provide as follows:

> Any person should be able to commence and maintain public law

proceedings unless

- The relevant legislation clearly indicates an intention that the decision or conduct sought to be litigated should not be the subject of challenge by a person such as the applicant; or,
- In all the circumstances it would not be in the public interest to proceed because to do so would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it differently or not at all....[28]

The ALRC also recommended that "standing should be presumed ..., [placing] the onus ... on those seeking to challenge a party's standing to show that one of the disqualifying factors is present."[29]

This new test of standing would not, however, replace the tests of standing that currently exist in the Act. The ALRC confirmed its recommendation in a previous 1985 report on standing(30) that there should be no changes, inter alia, to "standing specifically conferred by statute on government plaintiffs or private persons to commence and maintain a proceeding or to apply for particular relief."[31]

Table of Contents

III. Remedies:

3(a) Remedies Available to Private Litigants:

As already indicated in s§ 1(a) & 2(a) of the study, above, under s§ 80(1) and 82(1) of the Act, private litigants are entitled to sue for injunctive relief and/or single damages, although the prospect of obtaining an award of damages does not seem to be regarded as a significant factor motivating private litigants to bring suit. Since 1977, private litigants have been precluded from obtaining injunctive relief regarding mergers. Private parties are, however, entitled to obtain divestiture orders in merger cases. They are also entitled to bring class, or in Australian terms, representative, actions in Federal Court for contraventions of the Act as well as actions for declarations.

(1) Injunctions:

Section 80(1) of the Act provides as follows:

(1) Subject to subsections (1A), (1AAA) and (1B), where, on the application of the Commission or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:

(a) a contravention of a provision of Part IV, IVA, IVB or V;

(b) attempting to contravene such a provision;

> (c) aiding, abetting, counselling or procuring a person to contravene such a provision;
>
> (d) inducing, or attempting to induce, whether by threats, Promises or otherwise, a person to contravene such a provision;
>
> (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
>
> (f) conspiring with others to contravene such a provision; the Court may grant an injunction in such terms as the Court determines to be appropriate.

Just like the ACCC, private parties may obtain injunctive relief against contraventions or attempted contraventions of, inter alia, the restrictive trade practices provisions of Part IV of the Act. They may also obtain injunctive relief against those who aid in or induce a contravention, or are party to or co- conspirators in a contravention.

The ACCC, however, is the only entity that is entitled to obtain such injunctive relief against contraventions, etc., of the merger provisions of § 50 of the Act. Section 80(1A) of the Act provides:

(1A) A person other than the Commission is not entitled to make an application under subsection (1) for an injunction by reason that a person has contravened or attempted to contravene or is proposing to contravene, or has been or is proposing to be involved in a contravention of, section 50.

This restriction was placed in the Act in 1977 in response to apparent misuse by private parties of injunctive relief in merger cases.[32]

The remaining provisions of § 80 of the Act make it clear that the court is granted a broad jurisdiction to fashion any appropriate injunctive relief. Under § 80(2), the court may grant an interim injunction pending determination of an application for injunction under § 80(1). Under

§ 80(1AA), the parties may be granted an injunction upon consent "whether or not the Court is satisfied that a person has engaged, or is proposing to engage, in" a contravention of the Act. Under § 80(4), an injunction restraining the performance of an act may be issued regardless of whether it appears to the court that the person to be restrained intended to do the act; previously did the act; or, there is imminent danger of substantial damage to another if the person does the act. Under § 80(5), a mandatory injunction requiring the performance of an act may be issued in analogous circumstances. Finally, under § 80(3), the court may rescind or vary any injunction that it previously issued.

Under § 87 of the Act, the court is also empowered to grant any orders it thinks appropriate to remedy actual or likely loss or damage suffered by parties to the proceeding as a result of contraventions of Parts IV, IVA, IVB or V of the Act. These orders may void contracts, vary contracts, refuse enforcement of contracts, direct refunds or returns of property, direct payment of the amount of loss or damage, direct repair or supply of parts, direct the provision of services, or order the execution of instruments varying or terminating interests in land.[33]

Normally, the Federal Court requires an applicant for interim injunctive relief to lodge security with the court for damages or costs. In a 1996 report on compliance with the Trade Practices Act,[34] the ALRC said that small businesses regarded this as a barrier to seeking remedies under the restrictive trade practices provisions of the Act. The ALRC also noted that small business found that other rules of the court, such as its requirement that corporations be legally represented, similarly acted as barriers to seeking remedies under the Act. In light of these concerns, the ALRC recommended improvements to the ability of the then Trade Practices Commission to bring representative actions on behalf of those suffering loss or damage from a contravention of the Act.[35]

Continue | **Table of Contents**

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Publication Date - 2000-04-03

(2) Divestiture Orders:

While private parties are barred from seeking injunctive relief in merger cases, they are permitted to seek an order requiring divestiture of shares or assets acquired in contravention of the merger provisions of § 50 of the Act. Section 81(1) of the Act provides as follows:

> (1) The Court may, on the application of the Commission or any other person, if it finds, or has in another proceeding instituted under this Part found, that a person has contravened section 50, by order, give directions for the purpose of securing the disposal be the person of all or any of the shares or assets acquired in contravention of that section.

It would appear from the terms of this provision that a private party is permitted to seek this remedy even if the proceeding in which the contravention of § 50 was found was commenced by the ACCC or another private party.

Regardless of whether the divestiture provisions of § 81(1) of the Act are invoked by the a private party or the ACCC, the court is empowered to enter a consent order directing the disposal of assets or shares. Section 81(3) states:

> (3) Where an application for directions under subsection (1) or for a declaration under subsection (1A) has been made, whether before or after the commencement of this subsection, the Court may, if the Court determines it to be appropriate, give directions or make a declaration by consent of all the parties to the proceedings, whether or not the Court has made the findings referred to in subsection (1) and (1A).

The consent order may be entered regardless of whether the court has made any findings upon the application for divestiture.

(3) Damages:

Turning to the remedy of damages, § 82 of the Act provides:

> (1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVB or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

> (2) An action under subsection (1) may be commenced at any time within 3 years after the date on which the cause of action accrued.

Single damages are available to those who suffered loss or damage as a result of a contravention of, inter alia, the restrictive trade practices provisions of Part V of the Act. There is a three-year statute of limitations upon the time within which the action must be commenced.

It was suggested to the ALRC that punitive or multiple damages should be made available to private plaintiffs in addition to compensatory damages. The ALRC rejected this submission, saying:

> DP [Discussion Paper] 56 noted the suggestion that punitive or multiple damages should be available in Australia to provide an incentive to private enforcement by helping to defray the cost of litigation. The Commission did not agree with that suggestion and proposed that punitive or multiple damages should not be available to applicants in proceedings under the TPA. With few exceptions, submissions agreed. Punitive or multiple damages should not be available for contraventions of the TPA because:
>
> - they can provide a windfall to a plaintiff not matched by the deterrent effect
> - they can be an incentive to frivolous or speculative actions
> - recovery of multiple damages may still not exceed the risk and cost of litigation where the actual damages are very low
> - the possibility that they may be awarded in separate actions involving the same contravention could result in multiple punishment being inflicted for a single wrongful act
> - there is no justification for imposing a sanction, in the form of exemplary damages, on one person in order to deter other persons from acting in a particular way.

Many of these concerns are supported by critics of treble damages available under the antitrust laws in the USA. ... Contraventions of the TPA should only be punished under the relevant penalty provisions enforced by accountable public enforcement bodies. ...[36]

The ALRC took the position that punishment of contraventions of the Act should be the exclusive province of public enforcement bodies.

(4) Representative, or Class, Actions:

In Australia, class actions are referred to as representative actions. They are described as follows:

> Representative actions are a procedural mechanism allowing one person to take legal action on behalf of a number of people who are affected by a common problem. They allow people who have been

> wronged to enforce their rights as a group in a fair, efficient and economical fashion. Representative actions remove many of the financial barriers which ordinary people face when seeking to enforce their legal rights, give the courts a more efficient process for dealing with cases involving large numbers of people and help to ensure that laws are enforced more efficiently and more often. ...[37]

Representative actions are regarded as providing an economical method of enforcing the law in a more efficient manner.

Representative actions may be commenced by private plaintiffs under Part IVA of the Federal Court Act. Pursuant to Part IVA,[38] a representative action may be commenced "if there are seven or more persons with claims against the same person, the claims are all "in respect of, or arise out of, the same, similar or related circumstances' and the claims give rise to at least one substantial common issue of law or fact."[39] As to the latter requirement, the representative party and the group need not have identical claims. Substantial similarity between claims is sufficient. Representative actions are only considered to be inappropriate where incompatibility between the claims of the representative party and the group would lead to conflict among their interests.[40]

The ALRC noted that the Federal Court had yet to decide whether a consumer or business organization would be entitled to bring a representative action on behalf of its members. The question that would have to be answered would be whether the organization had a "claim" in its own right giving it standing to commence representative proceedings. The ALRC considered, however, that there was "merit in ensuring that Part IVA proceedings may be commenced by peak consumer or business organisations on behalf of aggrieved consumers or businesses."[41]

(5) Declarations:

Under §163A of the Act, private parties may seek declarations from the Federal Court regarding the operation or effect of most provisions of the Act, including the restrictive trade practices provisions of Part IV, as well as the validity of acts or proposed acts purporting to have been done under the Act. A declaration is an order of the court that has no other effect than to make an authoritative ruling on a particular issue. In itself, it does not impose upon a party liability for damages or other relief. Private parties may also seek extraordinary remedies in the form of orders prohibiting or directing the taking of certain actions by, e.g., administrative bodies. The jurisdiction of the court to make such orders must be exercised "by not less than 3 Judges."[42]

3(b) Remedies Available to the ACCC:

As might be expected, the ACCC has a broader range of remedies available to it than do private parties. The ACCC can bring proceedings for civil injunction, divestiture and pecuniary penalties. It may have the power to bring representative actions for damages on behalf of individuals or businesses injured as a result of a contravention of Part IV of the Act. The ACCC also has the power to engage in administrative enforcement of the Act by taking enforceable undertakings from those with whom it negotiates settlements.

(1) & (2) Civil Injunctions & Divestiture Orders:

The ability of the ACCC to seek injunctions and divestiture orders is governed by the same provisions of the Act as those relating to private parties. As might be expected, however, the powers of the ACCC are broader. Unlike private parties, the ACCC may seek all forms of injunctive relief against mergers and foreign acquisitions. It is not restricted by the provisions of §§ 80(1A) and 80(1AAA) of the Act. Moreover, when seeking interim injunctions against alleged contraventions of the Act, the ACCC is not required to give any undertakings as to damages.[43]

In its 1996 report, the ALRC noted that the then TPC was concerned about the apparent reluctance of the court to grant broad injunctive relief. The TPC "suggested that, if a business [that is] the subject of an injunction trades nationally, the injunction should apply nationally, irrespective of whether the conduct constituting a contravention was confined to one State. ..."[44]

While the ALRC stated that it appreciated this concern, it declined to recommend any change in the Act to accommodate it. The most that it would do was to "encourage judges to take a broad view of the purposes to be served by injunctions and, where appropriate, to grant injunctions in terms sufficiently wide to meet the concerns expressed by the TPC, provided the respondent is given clear notice of the conduct prohibited."[45]

In merger and acquisition cases, only the ACCC may seek an order from the court declaring "that the acquisition, insofar as it relates to the shares or assets ... [transferred to the acquirer] is void as from the day on which it took place."[46]As to foreign acquisitions governed by the Competition Tribunal under § 50A of the Act, only the ACCC or the Minister may seek an order from the Federal Court directing the acquirer to dispose of its shares or assets to ensure that it does not carry on business in the market while the declaration of the Tribunal remains in effect.[47]

Table of Contents

(3) & (4) Damages and Representative Actions:

At first blush, it would seem unlikely that the ACCC would have standing to sue for damages to consumers or businesses. To seek the remedy of damages under § 82 of the Act, a plaintiff must have suffered loss or damage by reason of a contravention of Parts IV, IVB or V of the Act. This would exclude the ACCC.

In certain circumstances,[48] §87(1B) of the Act empowers the ACCC to bring suit for damages, in the form of a representative action, on behalf of those who suffered or were likely to suffer loss or damage by reason of contraventions of certain parts of the Act. Contraventions of the restrictive trade practices provisions of Part IV of the Act, however, are not included among those for which § 87(1B) authorizes the ACCC to bring representative actions.[49]

Despite these obstacles, the ACCC may still be able to bring representative actions for breaches of the restrictive trade practices provisions of the Act. While the matter is unclear, the potential apparently exists under Part IVA of the Federal Court Act for the ACCC to bring representative actions for any contravention of the Act. The ALRC discussed this potential as follows:

> In DP [Discussion Paper] 56 the Commission invited comment on whether PtIVA of the Federal Court Act needs to be amended to make it clear that the TPC is able to bring representative actions for contraventions of any provision of the TPA. ... [A] fundamental question exists as to whether the TPC has a "claim" within PtIVA such that it has standing to bring a representative proceeding.... The Commission considers that the TPC's access to representative proceedings under PtIVA of the Federal Court Act should be clarified. The Commission ***recommends*** that the TPA be amended to give the TPC standing to bring representative proceedings under PtIVA of the Federal Court Act on behalf of persons who suffered loss or damage from a contravention of the TPA regardless of whether the TPC has a claim in its own right. ...[50]

The ALRC recognized that, depending upon whether the then TPC were held to have a "claim" within the meaning of Part IVA of the Federal Court Act, it might already have standing to bring a representative action in the court. It proposed an amendment to make it clear that the TPC had standing under the Federal Court Act to bring a representative action for contravention of any provision of the Trade Practices Act.

This proposal was consistent with the discussion paper that preceded the ALRC's report on compliance with the Trade Practices Act. In the discussion paper, the ALRC suggested that § 87(1B) be repealed and replaced with a provision allowing the then TPC to bring representative actions for contraventions of any part of the Act under Part IVA of the Federal Court Act. The suggestion met with some resistance, even from the TPC, which claimed that due to cost and efficiency considerations it preferred to retain § 87(1B) in a modified form.

> Thereafter, the ALRC made the following recommendation:
>
> [T]he Commission ***recommends*** that §87(1B) of the TPA be amended to:
>
> - remove the restriction that a representative action may only be brought where the TPC has brought a prosecution under §79 or proceedings for an injunction under § 80
> - allow a representative action to be brought for a contravention of any provision of the TPA in relation to which the TPC has an enforcement role.[51]

Pursuant to this recommendation, the ACCC would be expressly empowered to commence a representative action on behalf of those who suffered loss or damage from a contravention of any provision of the Act. The recommendation also disposed of the requirement of §87(1B) that to be entitled to bring a representative action, the ACCC must first have brought a prosecution or proceedings for an injunction under the Act.[52]

As of the time of writing, this proposed amendment has yet to be made; however, the ACCC recently initiated and concluded an action in Federal Court that had all the earmarks of an action designed to represent small businesses that were injured in a contravention of the restrictive trade practices provisions of Part IV of the Act.

On May 22, 1998, the ACCC instituted proceedings alleging breaches of the boycott provisions of the Act. The ACCC's application sought injunctive relief, a declaration of breach of the Act and findings of fact that would enable businesses that suffered loss or damage to seek compensation.[53] Interim injunctions were issued and periodically renewed in response to the ACCC's application. On September 3, 1998, the ACCC settled the matter. The settlement provided for a damages fund of up to $7.5 million to compensate small businesses damaged by the contravention.[54]

On October 8, 1998, the Chairman of the ACCC, Professor Allan Fels, announced that a trust fund had been set up with this money. He said, in pertinent part:

> The establishment of the Trust Fund today is an excellent result for those small businesses which suffered loss during the recent waterfront dispute. Throughout the waterfront dispute, the ACCC was determined to protect the interests of these small businesses without taking sides in the broader dispute. ...[55]

There seems to be little doubt that this settlement was similar to that which would have been reached by the ACCC in a representative action on behalf of the small businesses that were injured. Professor Fels indicated that this similarity was no accident, that the settlement, in fact, resulted from a determination on the part of the ACCC to protect the interests of the small businesses in question.

(5) Pecuniary Penalties:

Those who violate the consumer protection provisions of Part V of the Act may be subjected to criminal prosecution; however, under § 78 of the Act, criminal proceedings may not be instituted against those who contravene the restrictive trade practices provisions of Part IV of the Act.[56] Instead, the ACCC is empowered to bring civil actions for the recovery of pecuniary penalties. Section 77 of the Act provides as follows:

> **77 Civil action for recovery of pecuniary penalties**
>
> (1) The Commission may institute a proceeding in the Court for the recovery on behalf of the Commonwealth of a pecuniary penalty referred to in section 76.
>
> (2) A proceeding under subsection (1) may be commenced within 6

> years after the contravention.

There is a six-year statute of limitations within which the ACCC must act. Under § 76 of the Act, it can recover from corporate defendants up to $10 million for each contravention, and from individual defendants, up to $500,000 per contravention.(57)

As the Act now stands, only a monetary penalty may be recovered by the ACCC. The ALRC, however, recommended that, in addition, certain non-pecuniary civil penalties should also be recoverable by the ACCC. These would include such penalties as community service orders, adverse publicity orders, and even a form of corporate probation called a corporate supervisory order.[58]

Table of Contents

(6) Orders Prohibiting Individuals from Managing Corporations:

At the moment, the Act does not provide for the issuance of orders prohibiting certain individuals from managing corporations. The ALRC, however, regarded such prohibition orders as "one, if not the best, way of preventing further contraventions of the TPA."[59] It said:

> While a prohibition will undoubtedly be a penalty for the individual concerned, the principal consideration in making a prohibition order should be whether it is likely to prevent further contraventions of the TPA. ... The Commission acknowledges that such a prohibition will not prevent an individual from carrying on business as an individual or in a partnership but the Commonwealth's constitutional limits prevent it from prohibiting a wider range of activities. [Under the Australian constitution, § 51(xx), the Commonwealth can only make laws with respect to corporations.] ... The Commission ***recommends*** that § 230 of the Corporations Law be amended to enable the Federal Court, on application by the TPC, to prohibit a person who has been found, in a prosecution or civil penalty proceeding, to have contravened the TPA from managing a corporation for such period as is specified in the order. ...[60]

The ALRC recommended that the Federal Court be empowered to issue prohibition orders against individuals who were found to have contravened the TPA in a prosecution or civil penalty proceeding under the Act.

(7) Administrative Enforcement:

The powers of the ACCC to enforce the Act through administrative action have been described as follows:

> The TPC [as the ACCC then was] has power to investigate complaints and alleged breaches of the TPA and to take appropriate administrative or court action. The administrative enforcement

> mechanisms used by the TPC range from simple resolution, where the matter is resolved by informing the parties of their rights and obligations under the TPA, to formal undertakings under § 87B of the TPA, which are enforceable in the courts. Administrative decisions by the TPC are subject to review by the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 (Cth) or the TPA. The TPC also has administrative powers to grant and revoke authorisations and notifications. These powers are subject to review by the Trade Practices Tribunal. ...[61]

An alleged contravention of the Act may be resolved through negotiations with alleged contravenors, some of which may result in the execution of § 87B undertakings, which are enforceable by the Federal Court.[62]

According to a guideline published by the TPC before it was merged into the new ACCC,[63] § 87B undertakings are only used where there is sufficient evidence to prove a contravention of the TPA. According to the ALRC, "undertakings and associated reports will be placed on a public register unless there are compelling reasons to treat all or part of these documents as confidential. Over 20 § 87B undertakings have been accepted by the TPC."[64]

The ALRC recommended that those who were brought before the court for breaching their undertakings be required to lodge security with the court. The security would be liable to be forfeited if the party were brought back before the court for a subsequent breach.[65] To date, however, this recommendation has not been implemented.

There also were submissions to the ALRC upon whether the TPC should be empowered to make administrative cease and desist orders. The ALRC said:

In general terms, a cease and desist order would be a formal, administrative injunction to cease conduct allegedly in contravention of the TPA. Failure to comply with the order would be punishable by the Federal Court. Compensation may be payable if failure to comply with the order caused loss or damage. The exercise of any power to issue such orders would have to comply with the principles of natural justice and be subject to administrative and judicial review. ...[66]

While the then TPC saw this power as a useful enforcement tool, the ALRC declined to recommend it because of constitutional difficulties in designing it as a non-judicial power and the ALRC's perception that the TPC already possessed several other effective enforcement tools.[67]

3(c) Interim Remedies:

As indicated earlier in this study, interim injunctive relief is readily available to the ACCC and private parties in actions under, inter alia, Part IV of the Act.[68] A brief review of the case reports in the Federal Decisions data base(69) indicates that interim relief is often sought in restrictive trade practices cases.

3(d) Are Damages Awarded:

Damages are available to private litigants under the Act. There is little information on how often they are awarded. Certainly, the ACCC recently was able to extract in a settlement a $7.5 million fund to compensate small businesses who were injured by alleged contraventions of the restrictive trade practices provisions of the Act.[70] According to the Brunt study, however, the prospect of receiving a damages award is not regarded in Australia as nearly as important a factor as an injunction in motivating plaintiffs to file private actions under the Act.[71]

Table of Contents

3(e) Cost Awards in Private Actions:

The ACCC and all private litigants in proceedings brought under the Act are liable to pay the costs of the prevailing party. The practice of awarding costs against the unsuccessful party has become known as the costs indemnity rule. According to a recent report of the ALRC:

> The costs indemnity rule is also the basic cost allocation rule for civil proceedings in the United Kingdom, Canada, Japan and most European countries. The principal exception is the United States where the general rule is that each party must pay his or her own costs except where the litigation is vexatious or an abuse of process. ... The discretion to order an unsuccessful party to proceedings to pay the successful party's costs evolved in the equity jurisdiction, apparently in response to the concern that a person should not suffer loss as a result of having to assert or defend his or her rights. ... The most common reasons given for the rule are that it
>
> - compensates successful litigants for at least some of the costs they incur in litigating
> - allows people without means to litigate
> - deters vexatious or frivolous or unmeritorious claims or defences
> - encourages settlement of disputes by adding to the amount at stake in the litigation
> - deters delay and misconduct by making the responsible party pay for the costs his or her opponent incurs as a result of that delay or misconduct ....[72]

The costs indemnity rule evolved on the equity side of the courts. The most common reasons that have been given for employing the rule are to minimize losses incurred through asserting or defending rights, deter vexatious or frivolous litigation,[73] encourage settlement, and deter misconduct or delay in the course of the legal proceedings.

Application of the costs indemnity rule, however, does not recover for the prevailing party all of its actual costs. According to the ALRC, "The amount that can be claimed pursuant to a costs order may ... be as little as 40 per cent of the real costs expended."[74] There are two main reasons for this. First, the costs of investigation cannot be recovered.[75] Secondly, the courts, including the Federal Court, have adopted detailed schedules establishing maximum fee and disbursement levels that may be allowed in a claim for costs. Usually, these levels are far below those actually paid by the party.

The schedule of the Federal Court,[76] for example, only allows for counsel fees ranging from $120 to $177 per hour, depending upon whether counsel advised in his or her office or attended court.[77] The allowance for expert witnesses ranges from $104 to $518 per day.[78]Rule 12 of Order 62 of the court states that "higher fees shall not be allowed in any case except such as are by this Order otherwise provided for."[79]The allowable rates obviously are far below what actually would be paid in a complex competition case under Part IV of the Act.

There are also provisions in Order 62 either cutting down costs awards or disentitling prevailing parties from claiming costs. Some allowances for costs are discretionary, and may or may not be awarded depending upon, e.g., the fees and allowances already awarded; the importance of the proceeding; and the general conduct and cost of the proceeding.[80]The court may order non- payment of costs "which have been improperly, unreasonably or negligently incurred"[81] and even direct payment to the other parties of the costs they incurred as a result of this misconduct.[82] When damage claimants receive judgment for less than $100,000, their allowable costs are reduced by one- third.[83]The court may also cap the size of a potential costs award by issuing an order specifying "the maximum costs that may be recovered on a party and party basis."[84]

There are other circumstances in which reduced costs awards may be entered. It has been noted that:

> [O]ther orders may be made where
>
> - a party only succeeds upon a portion of his or her claim, in which case it may be reasonable for the successful party to bear the expense of litigating that portion upon which he or she has failed: *Forster v. Farquhar* (1893) 1 QB 564; *Hughes v. Western Australia Cricket Assoc (Inc) & Ors* (1986) ATPR 40-748
> - the costs of the matter have been increased significantly by one or more issues on which the successful party failed, in which case the successful party may not only be deprived of the costs of those issues but may also be ordered to pay the other party's costs of them: *Cretazzo v. Lombardi* (1975) 13 SASR 4
> - the successful party has unnecessarily or unreasonably commenced, continued or encouraged the litigation or has acted improperly: *Ritter v. Godfrey* (1920), 2KB 47; *Donald Campbell & Co. v. Pollak* [1027 AC 732; *Hughes v. Western Australia Cricket Assoc (Inc) & Ors* (1986) ATPR 40-749....[85]

Lack of success on all claims or issues in dispute, or even unnecessarily encouraging the litigation, may result in a significantly reduced award of costs.

The ALRC has recommended the following cost allocation rules for civil proceedings:

> In civil proceedings - costs follow the event [i.e., indemnity costs are awarded]
>
> - I pay my costs and your reasonable costs if I lose.
> - You pay your costs and my reasonable costs if I win.
> - However, if
> - the litigation is a public interest case [or]
> - one of us is unable to present his or her case properly or to negotiate a fair settlement then some other order may be made as to the shifting of costs or to the amount of costs that may be recovered.
> - Notwithstanding any other orders as to costs
> - I pay any costs incurred by another party as a result of my unmeritorious claims or defences or of any abuse by me of the court or tribunal process.
> - I can recover any costs I incur as a result of another party's unmeritorious claims or defences or abuses of the court or tribunal process.
> - Our ability to recover costs to each other (if any) may be limited by the imposition of cost caps and settlement rules.

The main difference between this recommendation and the costs rules that presently exist in the Federal Court would seem to be the suggestion that "reasonable costs" should be recoverable instead of the much lower costs currently allowable under the schedule of the court.

3(f) Comparison With Costs Awarded in Public Actions:

The ACCC is subject to the same costs indemnity rule as private parties. In fact, on one occasion an award of costs of over $4.5 million was made against the ACCC's predecessor, the TPC, when it lost an action under Part IV of the Act in which it sought pecuniary penalties and injunctive relief.[86]

Table of Contents

IV. The Role of the ACCC in Private Actions:

As previously discussed, the ACCC may have the power to bring representative actions on behalf of consumers or businesses injured as a result of a contravention of the restrictive trade practices provisions of Part IV of the Act, and has already sought at least one settlement with the flavour of a settlement in a representative action. In addition, the ACCC has the right, though little used to date, to intervene in private actions. This could lead to a takeover of a private action by the ACCC in appropriate circumstances. The ACCC also has the power to confer immunity from legal proceedings, including private actions, under the notification and authorization provisions of the Act.

Private parties often seek to induce the ACCC to take action in competition matters that affect them rather than expend from their own resources the considerable investment required to commence and pursue proceedings under Part IV of the Act. In deciding whether to take up such cases, the ACCC takes into account certain policy and economic factors, as well as its own enforcement priorities.

The ACCC will not make available to private parties the information and evidence it collects in the course of its investigations. The information must be made the subject of a freedom of information request or a subpoena. Interestingly, however, the ALRC has recommended that this evidence be made available to private parties who are or are about to become involved in bona fide actions under Part IV of the Act.

4(a) Power to Bring Representative Actions:

As indicated in Part 3(b) of this study, above, a possibility exists that the ACCC might already have the power under Part IVA of the Federal Court Act to bring representative actions seeking, inter alia, damages on behalf of consumers and businesses injured as a result of contraventions of the provisions of the Act. The matter is not free from doubt, however, because a fundamental question exists whether the ACCC would have a "claim" within the meaning of Part IVA of the Federal Court Act to give it standing to bring a representative proceeding. This question has yet to be addressed by the court.[87]

Currently, momentum seems to be gathering in favour of the ACCC. The ALRC has recommended that both § 87(1B) of the Trade Practices Act and Part IVA of the Federal Court Act be amended to make it clear that the ACCC may bring a representative action under either statute for, inter alia, contraventions of the restrictive trade practice provisions of Part IV of the Act. Moreover, less than six months ago, the ACCC won a settlement that was, in everything but name, a "representative action-type" settlement, with the ACCC acting as the *de facto* representative of small businesses injured by activity that contravened some of the provisions of Part IV of the Act.[88]

4(b) Right of Intervention in Private Actions:

The ACCC has a statutory right to intervene in most private actions involving the restrictive trade practices provisions of Part IV of the Act. Oddly enough, this right is found in § 163A of the Act, which speaks to the jurisdiction of the Federal Court to make declarations, inter alia, concerning the operation or effect of most provisions of the Act. Subsection 163A(3) provides, in pertinent part:

> (3) The Commission is not entitled to institute a proceeding in the Court under this section but may intervene in a proceeding instituted in the Court or in any other court, being a proceeding:
>
> > (a) That involves a matter arising under Part IV other than a matter arising under section 48; ....

According to this provision, in all but resale price maintenance actions under § 48, the ACCC may intervene in any proceeding brought by another person involving a restrictive trade practice falling under Part IV of the Act.

This right to intervene is not limited to the context of applications for declarations. A subsequent subsection, § 163A(3)(b), specifically addresses the power of the ACCC to intervene in declaration proceedings. It states that the ACCC may intervene in any proceeding "in which a party is seeking the making of a declaration of a kind mentioned in paragraph 1(a) or (aa)." The declarations mentioned in the latter paragraphs are those relating, inter alia, to the operation or effect of most provisions of the Act, including those in Part IV.

In light of this, subsection 163A(3)(a) must be read as granting the ACCC the right to intervene in proceedings involving restrictive trade practices under Part IV of the Act, regardless of how the proceedings were initiated. Otherwise, it would be redundant. The ALRC expressly recognized this. It said, "Although the TPC is not entitled to apply for a declaration under s 163A, it may intervene in proceedings brought by another person under § 163A(1)(a) *and* in proceedings involving a matter arising under Part IV."[89]

As far as available information indicates, however, the power to intervene has been seldom used. This was confirmed by Commissioner Bhojani of the ACCC.[90]

Table of Contents

4(c) Takeover of Private Actions:

While it seems that it would be theoretically possible for the ACCC to intervene in a private action under Part IV of the Act and then take over carriage of the action, this does not seem to have been done by the ACCC or its predecessor, the TPC. The Brunt study,[91] however, tended to indicate otherwise. It stated, in pertinent part:

> One celebrated §45 case, *Tradestock* [*TPC v. T.N.T. Management Pty Ltd.*, (1985) A.T.P.R. 40-367)], initially brought by a small transport broker, was discontinued when the applicant ran out of funds but *was taken over by the TPC* ... One of the reasons for the initial applicant being forced to discontinue was that she or he had assumed a *class* burden, one with very demanding problems of proof besides. In fact the litigation ran from 1976, when initiated by Tradestock, *was taken over by the Commission in 1978*, and finally concluded in 1985. The Commission lost and was forced to rely upon a special appropriation in excess of $4,500,000 to fund the award of costs against it. ..[92]

According to Brunt, the then TPC took over a private action from the initial plaintiff, Tradestock, and litigated it to an unsuccessful conclusion. As a result, it was forced to satisfy an award of over $4.5 million in costs.

A review of the reported decisions in the case, however, shows that the then TPC did not take over Tradestock's private action against T.N.T. and the other defendants, in the sense of intervening in the action that Tradestock commenced in 1976. Instead, on May 25, 1978, shortly after Tradestock went into liquidation, the TPC commenced its own action against the same defendants, claiming pecuniary penalties and injunctive relief against them.

There is no doubt that in the subsequent trial on the merits, the events surrounding a boycott of Tradestock by the defendants formed the core of the TPC's case. The principals of Tradestock were the main witnesses for the TPC. One principal of Tradestock was on the witness stand for 49 days. All this took place, however, in the context of the TPC's own proceeding. Tradestock's private action was simply discontinued.

4(d)Power to Confer Immunity via Notifications Re Exclusive Dealing:

Under sections 93 - 95 of the Act, a person who engages or proposes to engage in exclusive dealing may file a formal notice with the ACCC describing its conduct or proposed conduct. For all but third line forcing -- or tying -- arrangements, immunity from legal proceedings is granted from the time of filing and remains in force unless and until the ACCC responds with its own formal notice that after making an assessment, it considers the conduct to involve a substantial lessening of competition that is not outweighed by public benefit. Review of the ACCC's actions regarding notifications may be sought before the Competition Tribunal, formerly known as the Trade Practices Tribunal, an expert body comprised of both lay and judicial members.[93]

In a recent paper, Commissioner Sitesh Bhojani of the ACCC described the circumstances in which many such notifications are received. He said:

> The Commission receives many notifications for franchise and distribution agreements that would otherwise breach § 47. A typical situation is where a supplier appoints a retailer in a particular area and provides that retailer with exclusive rights over that area. In general there is no effect on competition from such an arrangement. However, the agreement can be anti-competitive if the supplier has a powerful position in the market. An exclusive franchising and distribution agreement may provide the opportunity to tie up entry to other levels of the market. This is where the Commission becomes interested in such an arrangement. ...[94]

Those who commonly employ franchising and distribution agreements form the majority of entities that file notifications under the Act.

Notifications of third line forcing arrangements do not result in automatic immunity. The period of immunity does not commence until after the expiration of 14 days from the filing of the notification. According to Commissioner Bhojani, "To deny immunity in respect of notified third line forcing the Commission must be satisfied that the likely benefit to the public will not outweigh the likely detriment to the public."[95]

Table of Contents

4(e) Power to Confer Immunity via Authorizations:

Upon receipt of an application under § 88 of the Act, the ACCC is empowered to grant authorizations for anti-competitive agreements, price fixing agreements, covenants affecting competition, anti-competitive exclusive dealing, anti-competitive third line forcing, resale price maintenance, and mergers substantially lessening competition. Once an authorization issues, it confers immunity from legal proceedings alleging that the conduct in question contravenes the applicable provisions of Part IV of the Act. All applications for authorization are kept on a public register, which may be inspected by any person.[96] Authorizations can later be revoked in light of changed conditions. The determination of the ACCC may be appealed to the Competition Tribunal.

The test to be applied in determining applications for authorizations has been held to be the same, regardless of the type of conduct under review. In *Re Media Council of Australia No. 2*,[97] Lockhart J. said:

> The Tribunal shall not make a determination affirming, setting aside or varying the Commission's determination unless it is satisfied in all the circumstances that the provision of the proposed conduct would result, or be likely to result, in a benefit to the public and that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the conduct were engaged in. ... The test is the same whether or not the provisions of the arrangement are governed by sub-section 96 or constitute "exclusionary provisions". ... In identifying the relevant public benefit the Tribunal must compare the position which would apply in the future were the proposed arrangement not entered into ... with the position in the future which would arise in the future if the arrangement were entered into. ...[98]

The test seeks to compare the future public benefit that would result if the conduct were prohibited with that which would result if the conduct were permitted. If the public benefit from permitting the conduct outweighs that to be gained from prohibiting it, an authorization will issue.

While it would be theoretically possible for a defendant in a private action under Part IV of the Act to stay the action and make an application for an authorization conferring immunity from the legal proceedings, this has seldom happened. When interviewed about this possibility, Commissioner Bhojani could only recall one instance. It involved a merger in the paste industry against which the ACCC had already commenced proceedings in the Federal Court. The respondents sought a stay and filed an application for an authorization. In light of the fact that the ACCC had already commenced legal proceedings against the merger, it seemed clear that the ACCC would not grant the authorization; however, the respondents apparently thought that they had a good chance of having the ACCC's determination overturned by the Competition Tribunal. In the end, the respondents were unsuccessful.[99]

4(f) Policy of the ACCC Re Taking up Cases or Leaving Them to Private Action:

The ACCC does not have a formally published policy governing whether it will take up a case or leave it to private action. In its 1997-98 Annual Report, however, the ACCC said, "When selecting matters [to pursue] the Commission is influenced by the potential for action to have significant deterrent effect, promote compliance with the Act and/or achieve redress for interests adversely affected by the conduct in question."[100]

These considerations appear to be reflected in the enforcement priorities that the ACCC set out in a recent paper on unconscionable conduct in business transactions. The ACCC said:

> The Commission will continue to select its [enforcement] priorities by having regard to key issues in its operating environment and whether or not:
>
> - the conduct involves significant small business detriment;
> - Commission involvement has the potential to have a worthwhile educative or deterrent effect;
> - the conduct involves a situation where the party complained about has not been diligent in implementing effective compliance systems ...;
> - the conduct involves a significant new market such as one arising from economic or technological change;
> - the conduct involves an opportunity to test the law in appropriate circumstances. ...
>
> The Commission's enforcement efforts will be focussed on conduct affecting small businesses including misleading and deceptive conduct (§ 52), third line forcing (§ 47(6)), abuse of market power (§46), resale price maintenance (§ 48), and unconscionable conduct (§§51AA and 51AC). As the largest number of complaints which may fit under these sections (particularly § 51AC) are in the retail tenancy and franchising areas these will be the areas of highest priority for the Commission in the immediate future. ...[101]

In terms of its priorities under the restrictive trade practices provisions of Part IV of the Act, the ACCC said that it focussed upon significant misconduct affecting small businesses that contravened the third line forcing, abuse of market power, or resale price maintenance provisions of the Act. The "significance" of the misconduct is evaluated according to (1) the degree of impact upon small business; (2) the potential for a worthwhile educative or deterrent effect; (3) the diligence of the accused in implementing effective compliance systems; (4) the involvement of a new market; and, (5) the potential for an opportunity to test the law.[102]

Table of Contents

4(g) Availability to Private Parties of Information Collected by the ACCC:

The investigative powers of the ACCC under the Act have been described as follows:

> Sections 155 and 156, together with ancillary provisions, are designed to enable the TPC to carry out its functions with respect to the detection and prosecution of contraventions of the TPA. Section 155 gives the TPC power to require a person it believes is capable of providing information, documents or evidence relating to a contravention of the TPA to furnish information, produce documents or give evidence. It also allows an officer authorized by the TPC to enter any premises and inspect any documents in the possession or under the control of a person who the TPC believes has engaged in conduct that may constitute a contravention of the TPA. Section 156 allows the TPC to inspect, copy and take extracts from any documents it obtains pursuant to a s 155 notice. ...[103]

In an investigation, the ACCC has relatively broad powers to collect all forms of evidence relating to a suspected contravention of the Act.

The ACCC does not provide this evidence to private parties involved in or contemplating bringing proceedings under the Act. It "will only release information on a specific matter if it has received a request under the Freedom of Information Act 1982 (Cth) or been served with a subpoena."[104] Moreover, in 1995, the TPC opposed being empowered to give private litigants information collected in its investigations. It said that the power "could deter people from volunteering information to the TPC, lead to a drain on TPC resources by having to process requests for information and be used as a basis for challenges to s 155 notices with parties claiming the notice was only being used to obtain information for a third party."[105]

Nevertheless, the ALRC recommended that "the TPA be amended to give the TPC power to give to a private litigant information the TPC has obtained from an investigation involving its powers under s 155 if it is satisfied that the person is carrying on, or contemplating in good faith, a proceeding in respect of a contravention of the TPA to which the information is relevant."[106] The ALRC said:

> Allowing the TPC, in appropriate cases, to provide litigants with information, documents or other evidence it has obtained would be an effective use of its resources. It would assist private litigants and reduce the need for the TPC to commence litigation itself or to intervene in proceedings.
>
> - Privacy only relates to personal information affecting individuals and can be protected by the use of guidelines and by the TPC imposing conditions on the release of information. The ASC [Australian Securities Commission] policy statement on confidentiality sets out the practices the ASC must follow when disclosing information obtained by the exercise of its compulsory powers ....
> - There is little risk of fishing expeditions as the TPC must be satisfied that the information relates to proceedings commenced or contemplated by the private litigant before it can release it. From the perspective of litigants, the release of information by the TPC under this power would be more analogous to the release of information pursuant to a subpoena than to

discovering documents.

- While administration of the power may require some additional resources, these could be minimised through the use of appropriate guidelines and procedures and should be offset by savings arising from not having to institute or intervene in as many court proceedings.
- The TPC already has comprehensive procedures for the use of s 155 to minimise the likelihood of challenges to its exercise. The introduction of this power should not alter the current situation. ...[107]

To date, this power has not been introduced into the Act. Those seeking evidence from the ACCC still must file freedom of information requests or subpoenas.[108]

Continue | **Table of Contents**

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Publication Date - 2000-04-03

V. Case Management and Efficiency of Proceedings:

5(a) Caseflow Management:

When it was established In 1977, the Federal Court was one of the first in Australia to adopt caseflow management procedures to minimize delays in litigation and provide parties with early hearing dates. The power of the court to adopt these procedures was founded upon § 59 of the Federal Court Act, which granted the judges of the court broad authority to make rules to be followed in the court, its registries and all incidental matters.

The caseflow management system of the Federal Court has been described in detail as follows:

General

Directions hearings are the core element of the Court's caseflow management system. The Court has wide powers to give directions and these are used to provide judicial supervision of the progress of matters from commencement to hearing. The caseflow management process is described by the Federal Court as follows:

> When an initiating document is filed, matters ... are given a return date for directions before a single judge. At directions hearings the judge gives whatever directions are necessary to assist the parties to identify the relevant issues. The judge also makes the necessary orders for the progress of a case to trial, such as orders for particulars and discovery. A case is adjourned to a fixed date by which parties are expected to have completed any interlocutory steps which have been ordered. When a judge is satisfied the case is ready for trial, a trial date is fixed according to the availability of parties, counsel and witnesses. ...

Directions hearings

Order 10 of the Federal Court Rules provides the framework for making orders on a directions hearing. Order 10 r 1(1) provides that on a directions hearing the Court shall give such directions with respect to the conduct of the proceedings as it thinks proper. Rule 1(2) provides a lengthy but non-exhaustive list of the matters with respect to which orders may be made. Among its specific powers, the Court may give directions as to the manner in which evidence of particular facts should be given and the form in which expert evidence should be received. For example, the Federal Court sometimes conducts a procedure, akin to a 'mini

> trial', where the applicant and respondent are both required to present their principal witnesses for cross- examination.
>
> *Listing Conferences*
>
> Another case management event in the Federal Court case management regime is referred to as a 'listing conference' or 'pre-trial settlement conference'. The Court orders the parties to attend a listing conference before a Registrar pursuant to O 10 r 1(2)(h) of the Rules.
>
> The conference is held with a view to satisfying the Registrar that all reasonable steps to achieve a negotiated outcome ... have been taken, or otherwise clarifying the real issues in dispute so that appropriate orders may be made, or otherwise to shorten the time taken for preparation for and at trial.
>
> *Case Management Conferences*
>
> The Court may also order that the parties attend a 'case management conference' with a Judge or a Registrar pursuant to O 10 r 1(2)(I) of the Rules.
>
> The purpose of this form of conference is [to] consider the most economical and efficient means of bringing proceedings to trial and of conducting the trial. At the conference the judge or the registrar may give further directions ....[109]

Directions hearings, listings conferences and case management conferences are used to limit the issues proceeding to trial and encourage the early settlement of disputes.

The ALRC noted that the Federal Court is contemplating a number of changes to its caseflow management system "aimed at disposing of 98% of cases within 18 months or less of commencement. It said:

> The main case management events under the proposals being considered by the Federal Court are:
>
> - directions hearings (held not more than 2 months after commencement) aimed at early filtering of cases by removal, referral to ADR and settlement or disposal if possible. ...
> - case management conferences (held not more than 4 months after commencement) to encourage settlement, referral to assisted dispute resolution or disposal, if possible. ...
> - evaluation conferences (held not more than 10 months after commencement) [to] focus on the disposition of the case without trial and evaluate preparation for the trial.
> - trial management conferences (held not more than 13 months after commencement) ... held, only where necessary, to establish ground rules for the conduct of the trial. ...[110]

It is anticipated that adding evaluation conferences and trial management conferences to the court's arsenal will result in the resolution of most cases within 18 months of commencement.[111]

Table of Contents

5(b) Alternative (or Assisted) Dispute Resolution (ADR):

At a directions hearing or listing conference, the court may order that all or part of the proceedings be referred to ADR. According to the ALRC:

> The Federal Court established an 'Assisted Dispute Resolution' program in 1987. Section 53A of the Federal Court Act provides that the Court may, with the consent of the parties, refer proceedings to a mediator or arbitrator in accordance with the Rules.
>
> Under these Rules, orders made at a Federal Court directions hearing may stream disputes into court-annexed mediation or arbitration processes. ....
>
> The Court's procedures for mediation and arbitration are set out in O 72 of the Rules. The program is based primarily on mediation of disputes by Registrars of the Court with the consent of the parties. Listing conferences under O 10 r 1(2)(h) ... may also explore the possibility of a mediated settlement.
>
> Federal Court Practice Note No. 8 provides that parties do not lose their priority in the hearing list should a mediation or listing conference be conducted.
>
> Parties to proceedings on the Western Australia District Registry of the Federal Court may also utilize court-annexed early neutral evaluation (ENE) under a pilot program operated by the court with the participation of Senior Counsel at the Western Australian Bar.
>
> ...[112]

The potential for referral to ADR appears to have become an entrenched part of the pre-trial process of the Court.

5(c) Consent Orders:

Under Order 35, Rule 10 of the Federal Court Rules, the terms of a settlement agreement may, upon the written consent of the parties, be issued as an order of the court "with the same force and validity as if it had been made after a hearing by the Judge."[113]All that need be done is to file an application for a consent order with the Registry of the court. The Registrar will bring the matter before a judge "who may, without any other application being made to the Judge, direct the Registrar to draw up, sign and seal an order in accordance with the terms of the consent."[114]

5(d) Summary Judgment:

Under Order 20, Rule 2 of the Federal Court Rules, a motion for summary judgment may be made for the stay or dismissal of frivolous or vexatious claims,[115] proceedings that constitute an abuse of process, or claims that disclose no reasonable cause of action. Under subsection (2) of Rule 2, the court may hold a hearing on the motion at which evidence may be received. As indicated above, it is anticipated that motions for summary judgment aimed at filtering out such claims will be made as early as the directions hearing.[116]

Under Order 52, Rule 10, leave to appeal an interlocutory ruling, inter alia, on a motion for summary judgment may be orally requested at the time the judgment is pronounced. Order 52, Rule 17, however, ensures that the appeal will not operate as a stay of the proceedings in the trial court.

The power of the trial court to dismiss or stay vexatious, etc., claims is regarded as the primary deterrent to their pursuit; however, the court's cost allocation rules may also help deter them by imposing financial sanctions upon those who file them.[117]Under Order 62 of the Federal Court Rules, Rule 3(1), the court has the power to award costs, including disciplinary costs, at any stage of the proceedings. Under Order 22, Rule 3, any party who discontinues its action before or after the directions hearing is liable to pay the costs occasioned by the proceeding to the other party or parties. Moreover, under Rule 9, the solicitor for a party may be ordered to pay or forego costs incurred by undue delay, misconduct or default for which he or she is responsible.

The ALRC has recommended that disciplinary costs orders should be available in the following circumstances:

> At any stage of proceedings a court or tribunal should be able to make a disciplinary costs order against a party, his or her legal representative or any other person involved in the litigation who, in the opinion of the court or tribunal,
>
> - does not comply with a procedural rule or order of the court or tribunal
> - causes unnecessary delays
> - significantly increases the costs of the matter by unreasonably pursuing one or more issues on which he or she fails
> - causes the other party to incur costs that were not necessary for the economic and efficient conduct of the proceedings, including costs incurred as a result of seeking leave to amend his or her pleadings or particulars or seeking an extension of time
> - engages in conduct that, in the opinion of the court or tribunal, hinders the efficient and just determination of the issues in dispute
> - has unreasonably refused to negotiate a settlement or participate in alternative dispute resolution
> - otherwise abuses the processes of the court[118]

For the most part, these recommendations appear to be in line with what already exists in the

Federal Court.

5(e) Efficiency vs. Quality of Justice:

It has been recognized by the ALRC[119] and legal commentators[120] in Australia that "[t]here can be a tension between the ideals of justice and the application of modern principles of management to increase the efficiency of the justice process."[121] According to the ALRC:

> The concern is that judicial management and case management may result in the existing system of justice being replaced with a lower quality system of justice, albeit one that may be cheaper and quicker at disposing of disputes. Judicial management may result in case processing becoming an end in itself, rather than the means of achieving justice.
>
> Such concerns about the quality of justice affect how courts approach case management compliance. For example courts tend to prefer monetary rather than preclusionary sanctions, which would prevent a party from taking or supporting a particular position in litigation, because they are reluctant to prevent litigation of claims on the merits. ...[122]

In the interests of preserving the quality of justice, many judges tend to compromise the goal of efficiency, preferring the imposition of monetary sanctions over striking dubious claims on the merits.

Table of Contents

5(f) Experience in the Federal Court With Private Actions Under the Act:

In 1995 the ALRC was asked to review the adversarial system of conducting civil, administrative review and family law proceedings before courts and tribunals exercising federal jurisdiction. As part of its inquiry, the ALRC undertook empirical work on the 700 cases finalized in the Federal Court during the period February to April, 1998. It released its preliminary findings in Discussion Paper 62: *Review of the federal civil justice system* in August 1999[123]. (The chapter relevant to this study is Chapter 10, *Case and hearing management in the Federal Court of Australia.*) The Commissioner in charge of the inquiry, Dr.¡Kathryn Cronin, summarized the findings on trade practices cases in the Federal Court, based on the ALRC's empirical data, consultations, and correspondence with the Federal Court[124], as follows:

- The most common trade practices cases in the Federal Court are competition cases and ?misleading and deceptive' cases. Unfortunately, when the ALRC collected the data for its empirical work, it did not distinguish between the different types of trade practices cases. Therefore, statistics which relate solely to competition cases cannot be isolated from the ALRC's empirical data.
- Trade practices cases made up approximately 8% of the Federal Court's total caseload

in 1998-99

- Competition cases (*Part IV Trade Practices Act* cases) are dealt with by a panel of specialist judges in the Sydney and Melbourne registries, allowing cases to be assigned to a judge who has particular expertise or interest in the area. In the other smaller registries where there are between three and five judges, no panel system is in operation.
- The median duration for cases in the ALRC's Federal Court sample was seven months for all cases and 14 months for trade practices cases. The trade practices sample cases included a few cases which took over three years to finalize. The Federal Court and practitioners in the area have informed the ALRC that these cases are not representative and have therefore skewed the duration figures. The Federal Court has since supplied the ALRC with statistical data on the 100 competition cases filed since 1 July 1996. These data reveal the following:
    - 69 cases out of the total 100 have been finalized.
    - Of the 69 finalized cases, 66% were discontinued or settled (22% were discontinued, 44% settled or had consent orders made), 30% went to a hearing and 4% were transferred to another jurisdiction.
    - Of these 69 cases the average duration was 38 weeks (9 months) with a range from one day to 2 years 34 weeks.
    - Of the cases that went to a hearing the average duration was 44 weeks (10 months) and the median duration was 38 weeks (9 months) with a range from one day to 2 years 8 weeks.
- Trade practices cases have more interlocutory applications than other case types with a median of 2 per case and a range of 1-19 per case compared with intellectual property cases which had a median of 1 and a range of 1-18.
- 35% of all cases in the ALRC's Federal Court sample proceeded to a final hearing and judgment and 57% were settled early in the process. 72% of trade practices cases were settled early in the process and only 19% proceeded to a final hearing and judgment. Trade practices cases had the highest settlement rate "at the door of the court" or after a case has been listed for a hearing with 8% of trade practices cases compared with 4% of cases overall settling "at the door"

As part of the review, a federal civil litigation working group was formed in September, 1996, to help the ALRC to describe the types of cases that come before the Federal Court as well as analyse and highlight the problems that arise at the various stages of the litigation. The working group produced a flowchart showing a profile of a typical restrictive trade practices case as it passed through the court. In comments to this flowchart, the working group noted, inter alia:

Part IV cases are characterized by a lengthy, hard fought contest to determine a complex raft of facts. The extent and nature of judicial control can impact greatly upon the length of hearing. Questions of relevance may be difficult to resolve at early stages. ... Many cases (probably more than 50%) are taken on appeal. Appeal processes may take two years or more to be completed. The costs of appeal may be relatively small compared to the cost of the main hearing as appeals will ordinarily be concluded within two hearing days. ...[125]

The hard-fought nature of Part IV cases and the prospect of more than 50% being appealed indicates that many Part IV cases take substantially longer than 18 months to reach final resolution. The flowchart and comments are appended to this chapter as Appendices A and

B.

5(g) Contribution of Private Actions to Competition Jurisprudence:

There seems to be little doubt that private actions have made a substantial contribution to the development of competition jurisprudence in Australia. As was said in the Brunt study:[126]

The first reported decision under Part IV - Restrictive Trade Practices of the Trade Practices Act 1974 (Cth) (?the Act') was a private action, *Top Performance Motors v. Ira Berk* (1975). The first reported High Court decision was a private action, *Quadramain v. Sevastapol* (1976). The most important judgment to date was yet another private action, *Queensland Wire Industries v. B.H.P.* (1989). In this case the Australian High Court handed down a judgment on ?misuse of market power' (§46 of the Act), universally hailed as a landmark decision. And over the last decade and a half, there has come a stream of significant decisions on the interpretation of various sections in Part IV of the Act arising from litigation initiated by private parties. To the three cases just cited we can add:

Adamson v. West Perth Football Club, (1979);
Tillmans Butcheries v. A'sian Meat Industry Employee's Union (1979);
Ron Hodgson v. Westco (1980);
Actors and Announcers Equity v. Fontana (1980, 1982);
Cool v. O'Brien, (1981, 1983);
Radio 2UE v. Stereo FM, (1980, 1982);
Outboard Marine v. Hecar (1982);
Dandy Power Equipment v. Mercury Marine (1982);
Williams & Hodgson v. Castlemaine Tooheys (1985, 1986);
Warman v. Evirotech (1986);
Hughes v. Western Australian Cricket Association (1986);
Mark Lyons v. Bursill Sportsgear (1987);
McCarthy v. Australian Rough Riders (1989, 1990);
Jewel Food Stores v. Amalgamation Milk Vendors Association (1989, 1990);
Paul Dainty v. National Tennis Centre Trust (1989, 1990);
Pont Data Australia v. ASX Operations (1990).

Even some of the decisions on the grant of interlocutory injunctions, by their nature of limited authority, have generated an interest extending beyond resolution of the immediate dispute, for example:

Victorian Egg Marketing Board v. Parkwood Eggs (1978);
Williams v. Papersave (1987);
Midland Milk v. Victorian Dairy Industry Authority (1988).

> Finally, we should note instances of enforcement action undertaken, in effect, jointly by private parties and the Trade Practices Commission - of private actions running on the ?coat-tails' of successful Commission prosecution, as in the damages suits:
>
> *Hubbards v. Simpson* (1982);
> *Parrys Department Store v. Simpson* (1983).
>
> Many more actions are instituted by private parties than are instituted by the Trade Practices Commission (?the T.P.C.'). While most of these private actions are settled or discontinued, on has the impression that more significant judgments on the merits stem from private than from public (i.e. Commission) actions.

These sentiments were echoed by Commissioner Bhojani of the ACCC, who added to the list of important decisions, *Re Eastern Express Pty Ltd. and General Newspapers Pty Ltd*[127]., which contributed to the law regarding market definition, predatory pricing and misuse of market power; *Dowling v. Dalgety Australia Ltd.*[128], which contributed to the development of the law relating to substantial lessening of competition under s. 45 of the Act; and, *News Ltd. v. Australian Rugby Football League*[129], which dealt at length with the law relating to concerted refusals to deal, i.e., group boycotts.

Table of Contents

APPENDIX A

FEDERAL COURT PART PRACTICES ACT CASE

Flowchart [PDF: 17 KB]

APPENDIX B

FEDERAL COURT PART IV CASE

Other comments

1. The profile presents an illustrative Part IV Trade Practices Act case. Note that such cases may also involve numerous other legal claims and interests which complicate the profile. The case may start with a contract dispute and escalate to involve numerous parties and allegations that relate to other forms of statutory and general law remedies.
2. Part IV cases will typically involve extensive discovery processes and the filing of numerous affidavits. There will usually be a factual dispute as well as a technical dispute.
3. Expert evidence will usually be required to determine the nature and extent of impact

upon the market. Views in relation to competition will need to be determined so that a market analysis can take place. The Trade Practices Tribunal was devised (to some extent) to assist in assessing expert evidence. The multifaceted nature of many Part IV disputes leads to many disputes being resolved in the court rather than the tribunal system.

4. Part IV cases are characterised by a lengthy, hard fought contest to determine a complex raft of facts. The extent and nature of judicial control can impact greatly upon the length of hearing. Questions of relevance may be difficult to resolve at early stages.
5. Court appointed experts could be used to reduce costs to some extent. Experts would be required to comment upon both the market and the competition. The greatest legal and other costs incurred by parties relate to expert evidence and discovery costs. Significant costs are also incurred in the subpoena process. Subpoenas may be directed at numerous competitors and this may result in increased numbers of interlocutory applications (and third party litigation).
6. Many cases (probably more than 50%) are taken on appeal. Appeal processes may take two years or more to be completed. The costs of appeal may be relatively small compared to the cost of the main hearing as appeals will ordinarily be concluded within two hearing days.
7. The role of the duty judge in dealing with complex and highly technical issues throughout the interlocutory stages is critical and may be one reason for maintaining Part IV specialists among the judiciary. Issues can be limited in preliminary stages. There may be a greater role for court appointed experts. Interrogatories may play a role in Part IV cases.
8. Settlement prospects and discussions will be affected in part by the nature and extent of ACCC involvement.
9. A Part IV case may form part of a takeover case.
10. The hearing is important for cross examination of witnesses. A hearing will inevitably involve complex mixed questions of fact and law if it gets that far.

Table of Contents

NEW ZEALAND

Introduction:

Modern competition law may be said to have had its beginnings in New Zealand in 1986, when the government enacted a revolutionary version of its Commerce Act (the Act).[130] The Act was intended to be a strong competition law to ensure that the economic liberalization and deregulation that New Zealand was instituting at the time, did not result in private regulation through cartel activity.[131]

Because the Australia-New Zealand Closer Economic Relations Trade Agreement[132] required member states to harmonize certain aspects of their antitrust legislation, the Act essentially copied many of the provisions of the Australian Trade Practices Act. The Australian Act was also regarded as the most desirable model to follow "because it appealed as a robust antitrust regime."[133] As a result, there was a substantial overlap between the two statutes in matters such as conduct actionable by private parties, standing to sue, remedies and penalties.

On June 29, 1990, the Act was amended. The amendment streamlined the merger regime, extended in some respects the power of the Commerce Commission to issue authorizations, extended the extraterritorial operation of the Act, and increased pecuniary penalties.[134]

At present, the Act is once again in the process of being reviewed and amended. The statutory review process was initiated in January, 1998, when Cabinet released a discussion document from the Ministry of Commerce entitled, "Penalties, remedies and court processes under the Commerce Act, 1986".[135] and invited submissions in response to it. In December, 1998, the Cabinet Economic Committee produced five papers in which it reviewed the discussion document and responses, and made recommendations to Cabinet.[136] Cabinet adopted the recommendations, and a proposed Commerce Act Amendment Bill was placed on the Order Paper in mid-1999. On July 29, 1999, further proposed amendments were placed on a Supplementary Order Paper. It appears that no action will be taken upon these proposed amendments until some time after the New Zealand parliamentary elections, which are scheduled for November 20, 1999. [137]

A review of these documents indicates that the proposed Commerce Act Amendment Bill will make a number of changes to the enforcement of the Act through both public and private action. These changes are said to be necessary to ensure that "[p]enalties and remedies under the Commerce Act ... support the goals of the Act by deterring anti-competitive conduct."[138]They include, *inter alia*:

> (1) Authorizing the Commission to seek pecuniary penalties of three times the value of the illegal gain, or, if the gain cannot be calculated, 10% of the annual turnover of the corporation;
>
> (2) Clarifying the Act to signal to the courts that private parties are entitled to exemplary damages;
>
> (3) Empowering the Commission to issue cease and desist orders;
>
> (4) Making hard core cartel conduct, such as output limitation agreements or market allocation agreements, per se illegal;
>
> (5) Prohibiting corporations from indemnifying their agents for penalties;
>
> (6) Granting discretion to the courts to prohibit offenders from directing or managing corporations for up to five years; and,
>
> (7) Possibly establishing a transparent amnesty program for individuals and corporations.

The potential impact of these proposed amendments will be noted wherever applicable in the following discussion.

Table of Contents

I. Private Actions: Overview:

1(a) Conduct Actionable by Private Parties:

Private actions are available for contraventions of Part II of the Act (Restrictive Trade Practices), and, since the 1990 amendments, Part III of the Act (Merger). Parts II & III prohibit the following practices:

Practice	Sections	Per Se Illegal?[139]
1. Arrangements substantially lessening competition	27, 28	No
2. Arrangements with exclusionary provisions (Group boycotts)	29	Yes
3. Price fixing (Goods or services) Exemptions:	30, 34	Yes[140]
(1) Joint venture pricing	31	
(2) Price recommendations	32	
(3) Buying groups	33	
4. Abuse of Dominant Position	36, 36A(since 1990)	No
5. Resale price maintenance (Goods only)	37 - 42	Yes
6. Mergers	47, 48	No

While the above prohibitions are similar to their counterparts in the Australian Act, the New Zealand Act does not contain any counterparts to the Australian prohibitions of exclusive dealing, third line forcing (tied selling), price discrimination or secondary boycotts. Exclusive dealing and tied selling are thought to be covered by §§ 27 and 36 of the Act, which prohibit, respectively, arrangements substantially lessening competition and abuse of dominance.[141] Price discrimination, in the *per se* sense, and secondary boycotts do not appear to be covered.

As in Australia, the Act grants private parties the right to sue for injunctive relief and/or damages for contravention of the above provisions.[142] The right to sue for damages for contravention of the merger provisions of the Act was granted in the 1990 amendments to the Act.[143] Unlike Australia, New Zealand did not take away the right of private parties to sue for injunctive relief in merger cases.[144]

1(b) In Practice, the Kinds of Actions that Private Parties Tend to Bring:

It appears from the discussion document released by Cabinet at the commencement of the statutory review,[145] that the majority of key decisions in private actions have dealt primarily with allegations of abuse of dominant position in contravention of § 36 of the Act.[146] An examination of these decisions reveals that most involved attempts to invalidate exclusive dealing or tying arrangements,[147] or gain access to products or facilities that the defendant refused to supply.[148] At least two key decisions involved other types of attempts to restrict entry into a market.[149] One decision involved imposition upon a discounter of a form of resale price maintenance.[150]

It seems highly likely that many more private actions were filed than those that went to decision. Unfortunately, no reliable information is available as to the types of competitive misconduct alleged in these suits. From the Australian results in this area,[151] which are somewhat more complete, it would seem that the range of misconduct alleged in all private actions that were filed would likely be similar to that observed in the actions that were concluded by decision.

Table of Contents

1(c) Where Private Actions are Commenced:

Under § 75 of the Act, the High Court of New Zealand is granted exclusive jurisdiction over, *inter alia*, applications for injunctions and actions for damages for contraventions of Parts II and III of the Act. Section 75 provides, in pertinent part, as follows:

> SECTION 75 JURISDICTION OF THE HIGH COURT
>
> 75(1) In accordance with this part of the Act, the High Court shall hear and determine the following matters:
>
> (a) In the case of contraventions of Part II of this Act, -- ....
>
> > (ii) Applications for injunction under section 81 of this Act:
> > (iii) Actions for damages under section 82 of this Act:
>
> (b) In the case of contraventions of Part III of this Act, -- ....
>
> > (ii) Applications for injunctions under section 84 of this Act:
> > (iia) Actions for damages under section 84a of this Act:
> > (iii) Proceedings under section 85 of this Act: ....

Note that for mergers, the High Court also has exclusive jurisdiction over § 85 requests for orders directing the disposal of assets or shares of a defendant.

1(d) Relative Number of Private to Commerce Commission Actions:

The discussion document issued by the Ministry of Commerce in 1998[152] indicated that, compared to private actions, Commerce Commission actions were few in number. It said:

> As is to be expected, the number of Commerce Act cases in which pecuniary penalties have been imposed is small. There have been thirteen since 1990 (although there have been many more private actions in the same period that have provided higher levels of certainty about what is or is not lawful conduct). This is low in comparison to cases brought under the Fair Trading Act [re misleading advertising, etc.] and the Health and Safety in Employment Act. The Commerce Commission took 31 cases to court under the Fair Trading Act in the 1995/96 year alone, and the Occupational Safety and Health Service had 169 successful cases in the same period.
>
> However, we consider that the low number of cases can be attributable to the difficulty in detecting Commerce Act breaches and the costs associated with taking cases rather than evidence that there is no problem with deterrence.

The relatively low number of Commerce Commission actions was attributable to the difficulty in detecting contraventions of the Act and the high cost of litigation. As to this, it was noted that "[t]he difficulty in detecting Commerce Act offences, in addition to the fact that the Commission has limited resources and therefore prefers to settle, means that judges are largely unfamiliar with making penalty orders under the Act."[153]

It also was concluded in the discussion document that due to high litigation costs and other litigation disincentives, the private actions that were being filed were too few in number and, in any event, ultimately ineffective in deterring anti-competitive conduct. The other litigation disincentives that the document noted included: (1) the availability to private litigants of merely compensatory damages; (2) the difficulty in proving a causal connection between anti-competitive conduct and the damages alleged by the complainant; (3) the requirement to give undertakings as to damages in interim injunction proceedings; (4) the tendency of the courts not to consider the broader interests of consumers in deciding whether to issue interim injunctions in private actions; and, (5) the reluctance of courts to issue mandatory injunctions calling for on-going supervision.

1(e) Length of Time Private Action in Place:

In New Zealand, the private right of action has been in place since the enactment of the new Commerce Act on April 28, 1986. Prior to the enactment, which was regarded as a "momentous change in economic thinking in New Zealand,"[154] the enforcement of New Zealand competition law was philosophically constrained by an amorphous "public interest standard" modelled on the then U.K. Restrictive Trade Practices Act. Enforcement was left in the hands of a sometimes cumbersome bureaucracy.[155]

Table of Contents

II. Standing to Sue:

2(a) Standing to Initiate a Private Action:

As in Australia, the Act provides for open standing to sue for injunctive relief. Section 81 of the Act, which relates to Part II restrictive trade practices, provides that "[t]he Court may, on the application of the Commission or any other person, grant an injunction." Section 84 of the Act similarly provides for open standing to sue for injunctive relief in merger cases.

Actions for damages, however, may only be brought by those whose loss or damage was caused by the alleged contravention of the Act.[156] For Part II offences, this restriction appears in § 82(1) of the Act. The same restriction appears in § 84A of the Act, which provides an action for damages for contravention of the merger provisions of the Act.[157]

2(b) Criteria Applied to Determine Standing:

There does not appear to be any meaningful jurisprudence in New Zealand upon standing to sue. Given that §§ 81 and 84 of the Act grant open standing to sue for injunctive relief, this does not appear to be remarkable. As for private actions claiming damages, the main stumbling block to making a successful claim appears to be the causation requirement in §§ 82(1) and 84A of the Act.[158]There have been few cases in which damages have been sought and none in which damages were awarded.[159]

III. Remedies:

3(a) Remedies Available to Private Litigants:

(1) Injunctions:

(a) General:

As has already been indicated, New Zealand, like Australia, grants private parties the right to obtain broad injunctive relief. The basic injunctive provisions are §§ 81 and 84 of the Act, which grant to "the Commission or any other person" the right to obtain an injunction restraining, inter alia, contraventions, attempted contraventions, or conspiracies to contravene the provisions of Parts II and III of the Act. Under § 88(2)(b) of the Act, the court may also grant interim injunctions "[i]f in the opinion of the [c]ourt it is desirable to do so" and regardless of whether it appears to the court that the target of the interim injunction "intends to engage again, or to continue to engage" in the alleged misconduct.

Apart from granting the power to issue interim and permanent injunctions, the Act, in § 89 (1), empowers the court in, *inter alia*, actions for injunctive relief, to "make such order or orders as it thinks appropriate" against parties to the proceeding. If a contract is involved in the alleged contravention, the court is granted jurisdiction under § 89(2) to vary the contract as it thinks fit; cancel the contract; or, require a party to the contract to make restitution or pay compensation to another party thereto. Under § 89(3), the court is granted the same powers with respect to covenants which contravene or, if enforced, would contravene, the Act.

(b) Interim Injunctions:

The discussion document released by Cabinet [160]expressed considerable disappointment with the treatment by the courts of applications for interim injunctions under the Act. It defined the difference between permanent and interim injunctions as follows:

> Permanent injunctions are orders that restrain persons from engaging in conduct that contravenes the law. Under competition law interim injunctions protect plaintiffs and other individuals not party to the case (predominantly consumers) from damage that could not be recovered should the conduct be found to have contravened the law at full hearing. Both types of injunctions can order a person to either desist from or require conduct (a mandatory injunction).

Interim injunctions were regarded as protecting both private plaintiffs and consumers from sustaining non-recoverable injuries as a result of continuation of the impugned misconduct pending final decision on the merits.

In deciding applications for interim injunction under the Act, however, the courts seldom took into account the broader interests of consumers. The courts generally applied the criteria set forth by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*,[161] which essentially required consideration of whether the plaintiff had established a *prima facie* case, and if so, the balance of convenience between the parties.[162]

Failing to consider the broader public interest -- and in particular the interests of consumers -- in applications for interim relief in competition cases, the discussion document said, might have contributed to interim relief rarely being granted.[163]The discussion document observed:

> There is a significant difference between the standard role for interim injunctions and interim injunctions under competition law. When considering where the balance of convenience lies the courts also need to consider the broader public interest. The reason for this is that regardless of whether the plaintiff's relationship to the defendant is competitor, supplier or customer, if the defendant's conduct is anti- competitive the plaintiff is unlikely to be the only person harmed.
>
> Society as a whole will be harmed, particularly consumers. This harm can take the form of higher prices, reduced output, productive inefficiencies and delayed innovation. However, there is no real prospect of consumers generally being able to recover the damage at full hearing because, while the total detriment may be significant, in most cases there will be large numbers of consumers who each suffer small amounts of harm who will not be a party to the case.....
>
> Should the court decide at the full hearing that the conduct is anti-

> competitive, it will, by then, be too late for the court to impose any remedy that will compensate the bulk of consumers for any damage they have already suffered. The only way that other consumers can be protected from this detriment is for the courts to consider their interests when deciding whether or not to issue interim injunctions. ....[164]

Declining to give sufficient emphasis to the interests of consumers in weighing the balance of convenience , the document suggested, might have led to denial of critical interim relief, thereby permitting defendants to continue to subject consumers to non- recoverable damages by persisting in imposing higher prices, reduced output, productive inefficiencies and delayed innovation pending trial.[165]

The need to protect consumers through the liberal granting of interim injunctions was said to be acute in cases of refusal to supply and denial of access to essential facilities. The document said:

> These are important considerations when it comes to cases involving refusals to supply, including constructive refusals to supply. They are particularly important in cases involving the alleged denial of access to essential facilities. The reason for this is that in most cases the allegedly illegal conduct may continue during the course of the proceedings. The total detriment to consumers can be very large over the time it takes for the High Court to make its final decision (plus any subsequent decisions by higher courts on appeal). The incumbent monopolist will have strong incentives to delay granting access by delaying the legal process as much as possible if the court's orders in previous decisions, including any hearing seeking interim relief in the same set of proceedings, were not deterrents-focussed. ....[166]

The strong incentive for a defendant to continue refusing to supply or denying access pending an often-distant final decision was seen as an major reason for favouring the liberal granting of interim injunctions in such cases.

In response to these concerns, the Cabinet Economic Committee made the following comments and recommendation:

> In considering applications for interim injunctions, the Act permits the courts to take into account not only the interests of the litigating parties, but also broader economic interests, such as the interests of consumers..... However, at present the act is silent about the extent to which broader interests should be considered in interim injunction hearings. Officials have reviewed most of the decisions to date and have concluded that the weighting given to the interests of consumers has been inconsistent over time. To provide consistency and thus increase certainty, it is proposed that the criteria for the consideration of interim injunction applications be made more

> explicit, by specifying that the interests of consumers be considered and that an appropriate weighting be given to those interests. ....[167]

The Cabinet Economic Committee recommended that the Act be amended to specify that the courts must consider the interests of consumers and give them appropriate weight in deciding applications for interim injunctions under the Act. It added that, while caution was still necessary in issuing injunctions, this step would make it "more likely that injunctions to stop inefficient conduct will be granted."[168] Cabinet adopted this recommendation, and a provision to this effect was included in the Commerce Act Amendment Bill.[169]

(c) Permanent Injunctions:

Because the Act seemed to fail "to consistently deter would-be offenders partly because its associated court processes ... [were] costly and subject to delay",[170] the Cabinet Economic Committee recommended in principle that the Commerce Commission be empowered to issue cease and desist orders against restrictive trade practices. At the moment, it appears that the Commission will be restricted to issuing cease and desist orders in Commission-initiated proceedings. It seems likely, however, that if the power is limited to Commission-initiated proceedings, private parties will attempt to minimize cost and delay by seeking to induce the Commission to commence proceedings for cease and desist orders before making application for injunctive relief in court.[171]

The discussion document also noted that there had been a low success rate with mandatory injunction applications. It stated that the main reason for this "has been a concern that the Court may have to become involved in on-going supervision or may have to hear another case on the same or similar conduct some time in the future."[172] While the low success rate was regarded as providing "comfort to firms that control essential facilities",[173] the discussion paper did not reach any conclusions regarding the desirability of liberalizing the consideration of applications for mandatory injunction.[174] There were no recommendations upon this subject from the Cabinet Economic Committee and the Commerce Act Amendment Bill did propose any changes in this respect.

Continue | Table of Contents

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Publication Date - 2000-04-03

(2) Divestiture Orders:

Unlike Australia, New Zealand does not grant private parties the right to obtain divestiture orders in merger cases. Section 85(1) of the Act provides that the court may issue such orders "on the application of the Commission." It does not make any reference to applications by other persons.

(3) Damages:

Under §§ 82 and 84A of the Act, private parties are entitled to claim damages for any loss or damage caused by a contravention of the restrictive trade practices or merger provisions of the Act. To date, however, damages have been claimed in only a small number of cases and no damages appear to have been granted.[175] The main reason for this seems to have been an inability to establish a sufficient causal connection between the plaintiff's loss and the anti-competitive conduct in question.[176]

The discussion document took the position that the role of damages under the Act should be to deter anti-competitive conduct as well as compensate plaintiffs for their losses. It said:

> The Commerce Act, like competition laws in some other jurisdictions, provides for both public and private enforcement. This private right of action implicitly recognises that the public enforcement agency has limited resources to take cases and that private enforcement can supplement public enforcement.
>
> The main issue that we consider ... is whether the role of damages under competition law is to compensate or deter or both. We conclude that there is a deterrence role and that the current approach to damage awards does not achieve the deterrence objective. We present two options for change, on which we seek views: multiple damages and awarding pecuniary penalties in private actions. ....[177]

To make private actions an effective deterrent supplementing public enforcement, the discussion document suggested awarding either multiple damages or pecuniary penalties.

After reviewing the discussion document and a number of submissions that were made in response to it, the Cabinet Economic Committee declined to recommend either suggestion.[178]Instead, it chose the alternative of increasing the availability of exemplary damages. The committee suggested that the Act be clarified to indicate that exemplary damages are available and that Parliament signal to the courts during the passage of a

Commerce Act Amendment Bill that it "anticipated that the application of exemplary damages would be relatively more frequent in Commerce Act cases. This is because the wider economic damage from anti-competitive conduct typically far outweighs the damage to a single rival."[179] Cabinet agreed to make this amendment, and § 9 of the Commerce Act Amendment Bill expressly authorized the court to order the payment of exemplary damages, "even though the Court has made or may make an order directing the person to pay a pecuniary penalty." [180]

(4) Class Actions:

The High Court rules in New Zealand permit class actions to be brought for, inter alia, contraventions of the Act. At the moment, however, the rules are very restrictive and are regarded as unlikely to be of assistance to large groups of potential litigants. There is no record of a class action ever being decided under the Act.[181]

Table of Contents

(5) Declarations:

A declaration is an order issued by a court that has no other effect than to make an authoritative ruling upon a particular issue. It does not grant damages or other relief to any of the parties. Declarations are available in private actions in the High Court and have been issued in at least two private actions under the Act.

In *Union Shipping New Zealand Ltd. v. Port Nelson Ltd.*,[182] for example, the court refused to enjoin Port Nelson from charging a wharf user levy that allegedly deterred competition in contravention of the abuse of dominance provisions of § 36 of the Act. Instead, the court declared that there appeared to be some elements of double counting in the calculation of the levy and that the parties should carry out at their own expense an independent cost accountancy analysis.

In *Clear v. Telecom* (1993),[183] the Court of Appeal declared that Telecom's negotiating stance contravened the abuse of dominance provisions of § 36 of the Act. It refused, however, to award any damages or injunctive relief to Clear because of Clear's own unreasonable negotiating stance. Instead, the court directed the parties to return to negotiations and warned that if they could not reach agreement they might have to seek the assistance of an arbitrator or face the prospect of direct government regulation.

(6) Other Orders:

Under § 89(1) of the Act, the court is "granted wide powers to make any other order, whether or not it grants an injunction, if it finds that a party to the proceedings has suffered or is likely to suffer loss or damage from a contravention of Part II [restrictive trade practices]."[184] Section 89(1) reads as follows:

> 89(1) Where, in any proceedings under this Part of the Act, the Court finds that a person who is a party to the proceedings has suffered, or is likely to suffer, loss or damage by conduct of another

> person that was engaged in contravention of any of the provisions of Part II of this Act, the Court may, whether or not it grants an injunction or makes any other order under this Part of this Act, make such order or orders as it thinks appropriate against the person who engaged in the conduct, or any other person who in relation to the contravention did any act referred to in section 81(b) to (f) of this Act. ....

The court may grant any order "it thinks appropriate" against the person who contravened the Act and any other person who, under §§ 81(b) - (f) of the Act aided and abetted, induced or conspired in the contravention.

Under § 89(2) of the Act, the court is empowered to vary or cancel contracts that contravene the Act, or order restitution or compensation to parties to the contract. Section 89(2) provides:

> 89(2) Where a contract is entered into in contravention of this Act, or as the case may be, a contract contains a provision which if given effect to would contravene this Act, the Court may, in any proceedings under this Part of the Act, or on application made for the purpose by a party to the contract or any person claiming through or under any party to the contract, make an order--
>
> (a) Varying the contract, in such manner as it thinks fit, not being a manner inconsistent with the provisions of this Act:
>
> (b) Cancelling the contract:
>
> (c) Requiring any person who is a party to the contract to make restitution or pay compensation to any other person who is a party to the contract.

These powers may be exercised regardless of whether the suit originally filed by the plaintiff claimed damages or injunctive relief.

To date, it seems that there has been only one case in which the court has exercised its powers under § 89(2) of the Act. In *Shell (Petroleum Mining) Company Ltd. and Todd Petroleum Mining Company Ltd. v. Kapuni Gas Contracts Ltd. and Natural Gas Corporation of New Zealand Ltd.*,[185] the court declined to award compensation to the affected party but varied the contract to eliminate the provision that contravened the Act. According to the discussion document, "this is the only instance of an 'other' order being made."[186]

Table of Contents

3(b) Remedies Available to the Commerce Commission:

(1) Interim, Permanent and Mandatory Injunctions:

Under §§ 81, 84 & 88 of the Act, the Commerce Commission has the same powers as private parties to obtain interim, permanent and mandatory injunctions against restrictive business practices and mergers. Most of the key injunction decisions under the Act, however, were obtained in private actions.

One of the main reasons for the lack of Commission-initiated injunction actions appears to be the limited budget of the Commission. This was noted in the Cabinet Economic Committee's review of the Act, which stated, in pertinent part:

> The Commerce Commission has stated that one of the key impediments to the Commission seeking interim injunctions to halt anti-competitive conduct is the requirement for the Commission to give undertakings as to damages. The Commission is particularly concerned that if an undertaking for damages has to be given and that undertaking had to be honoured, the amount involved would become a debt against the Commission's finances.
>
> Although the amount for which the Commission could be liable is capped at $40 million [under § 88(3A) of the Act], there is at present no agreement, or understanding, for the Government to write off any such debt. This places an impediment on the Commission's ability and willingness to seek interim injunctions. This means that this enforcement tool is not being used to halt anti-competitive conduct throughout the economy to the extent desired. Nor is the threat of interim injunctions likely to be offering an adequate deterrence. ....[187]

The impediment to the Commission's budget that would result from having to honour an undertaking for damages effectively induced the Commission to avoid seeking interim injunctions. In most circumstances calling for interim injunction, it sought to negotiate deeds with the parties "freezing the competitive situation until the completion of the Commission's investigation , and/or any court action."[188]

To make injunctions more attractive, the Commission proposed an amendment to the Act excepting it from giving undertakings in applications for injunctions, or, alternatively, an understanding that the New Zealand government would fund the cost of any undertaking for damages that the Commission was required to honour.[189] The Cabinet Economic Committee noted that the proposed statutory amendment would bring New Zealand into line with Australia, stating:

> One way to greatly increase the use of the interim injunction remedy would be to exempt the Commission from giving undertakings as to damages. This situation currently applies in Australia where undertakings to damages are neither required nor given, by the Australian Competition and Consumer Commission. ..[190]

The Committee declined, however, to recommend the proposal. It concluded that "it would be inequitable for the Commission not to be liable for the damage it may cause to firms through interim injunctions,"[191]and it also "would increase the Commission's ability to distort markets, unfettered by the disincentive to do so that is currently imposed by the liability for costs."[192]

Instead of adopting either of the Commission's proposals, the Committee recommended, and Cabinet agreed,[193] that the Commission should be given the power to issue cease and desist orders. It was thought that if the Commission had this power, "it would not need to apply for interim injunctions except in exceptional circumstances .... [where] although unsure of all the facts, [it] sees a need for urgent action."[194]

(2) Cease and Desist Orders:

As envisioned by the Cabinet Committee, a cease and desist order under the Act would be "a formal administrative injunction to cease conduct allegedly in contravention of [the restrictive business practice provisions of] the Act."[195]It would be issued by the Commissioners in response to investigations of alleged contraventions by the Commission's staff. The order "would be limited to stopping conduct .... [It] would not involve requiring positive undertakings on the part of businesses."[196]An order of the Commissioners "would be appealable to the High Court and be subject to judicial review; however, the order would apply pending any judicial review or appeal. The Commission would be liable for damages where it was shown that it acted unreasonably or in bad faith."[197]

Interestingly, the Commerce Commission opposed being granted the power to issue cease and desist orders. It favoured making improvements in its ability to apply for interim injunctions and continuing to rely upon its ability informally to negotiate deeds freezing the competitive situation pending investigation and/or court proceedings. The Commission also expressed concern over the need to develop procedures granting due process, such as a right to be heard and right of appeal, to those who would be affected by a cease and desist order.[198] The Department for Courts noted in a similar vein that "the rights of appeal and judicial review associated with cease and desist orders could result in minimum improvement in terms of the time and cost problems associated with Commerce Act litigation."[199]

The Cabinet Committee discounted these concerns. It noted that in the United States, cease and desist orders from the Federal Trade Commission were very effective and, in practice, were subject to relatively little appeal.[200] The Committee added:

> [I]n the view of officials, interim injunctions do not currently afford all of the advantages offered by cease and desist orders. Rather, cease and desist orders would be a desirable supplement to interim injunctions because they
>
> - avoid court proceedings;
> - are low cost;
> - are preferable for infringements of the Act which do not justify court action by the Commission;

- can be introduced quickly; and
- avoid the continuing cost to the economy of a likely breach of the Act.

...[201]

It was proposed in principle to empower the Commission to issue cease and desist orders, with a final decision being made by Cabinet following receipt of an official's report "on the procedures and structures and any sanctions required for the Commission to undertake this function."[202] Cabinet agreed, and after review of the report placed the cease and desist power on the Supplementary Order Paper.[203]

Table of Contents

(3) Pecuniary Penalties:

Like Australia, New Zealand does not criminalize anti-competitive conduct. The Act provides instead for the Commission to obtain pecuniary penalties in civil proceedings in the High Court.[204]Currently, the maximum penalty is $5 million for corporations and $500,000 for natural persons.[205]

In August, 1998, the High Court awarded more substantial pecuniary penalties against corporations and individuals than it ever had before. It awarded pecuniary penalties totalling $5.5 million against nine meat companies. It also awarded a penalty of $380,000 against a Christchurch bus company and a penalty of $10,000 against its chief executive.[206]

The Cabinet Economic Committee concluded that even penalties of this order were too low to serve the deterrence objective of the Act.[207] It said, "the maximum penalty for bodies corporate is less than one day's turnover for the largest firms in the New Zealand economy. Furthermore, cartels in some of the larger oligopolistic markets in New Zealand would recover the cost of the penalty in a few weeks."[208]

After reviewing the penalty regimes in other jurisdictions, the Cabinet Economic Committee recommended, and Cabinet agreed,[209] that New Zealand adopt the Swiss model. The Committee said:

> [I]t is proposed that penalties be allowed to be imposed of up to three times the illegal gain, or 10% of annual turnover (i.e. the Swiss model). The Swiss model is preferred as it has the advantage that it sends a signal to the courts that penalties should be punitive by using a multiple of the illegal gain. The model then acknowledges the difficulty of calculating illegal gain by providing a proxy - the percentage of turnover. ....[210]

The Swiss model was regarded as best serving the deterrence objective of the Act. It was embodied in § 6 of the Commerce Act Amendment Bill.

The Committee did not recommend any change to the $500,000 maximum penalty for individuals. It considered this to be high enough to promote deterrence. Noting that little use of this penalty had been made, however, the Committee suggested "[s]ignalling to the High Court, via a statement in the Act, that there is a greater need to impose pecuniary penalties for individual perpetrators."[211] It was also recommended that the Act prohibit "bodies corporate from indemnifying their agents for any penalties imposed upon them."[212] Cabinet agreed to both amendments. The Commerce Act Amendment Bill provided that a court "must order an individual to pay a pecuniary penalty, unless the Court considers that there is good reason for not making such an order." It also prohibited indemnification of corporate agents.[213]

The Committee further recommended, and Cabinet agreed,[214] that § 80(2) of the Act, which sets forth the criteria for the High Court to consider in determining an appropriate penalty, be "recast within a deterrence framework."[215] Under the amendment, the court would be directed to "have regard to the nature and extent of the illegal gain, or the expected illegal gain."[216] It was said that this amendment would be likely to minimize "the chance of inappropriate penalties being imposed, and thereby provide greater certainty to the business community in terms of the likely costs of contravening the Act."[217] This change was reflected in § 6 of the Commerce Act Amendment Bill.

(4) Orders Prohibiting Individuals From Directing or Managing Corporations:

This power does not yet exist under the Act; however, the Cabinet Committee recommended that the Act be amended to give the courts "the discretion of prohibiting offenders from directing or managing a body corporate for up to five years."[218] Section 7 of the Commerce Act Amendment Bill would insert a new § 80(c) into the Act to implement this change.

(5) Divestiture Orders:

Unlike Australia, New Zealand does not permit private plaintiffs to seek divestiture orders in merger cases. Under § 85(1) of the Act, only the Commission is entitled to obtain such orders. Under §§ 85(1)(b)-(d), an order may direct the disposal of assets or shares as determined by a court or as established in an undertaking given to the Commission in an application for clearance or authorization.

(6) Administrative Enforcement:

As in Australia, New Zealand grants the Commission the power to issue authorizations permitting certain restrictive business practices and mergers, so long as their public benefit outweighs the lessening of competition.[219] Proposed mergers may be given advance clearances.[220] The parties requesting authorizations or clearances may be required to give written undertakings to the Commission. These undertakings form part of an authorization or clearance once it is issued.[221]

In the course of its investigations, the Commission may issue warnings or negotiate staff or Commission settlements. Warnings are informal attempts to persuade the targets of investigations to change their conduct. They may be issued by telephone or in a meeting, followed by a letter setting out the opinion of the Commission that the conduct in question breaches or is at risk of breaching the Act. Staff settlements take the form of signed undertakings to alter the impugned conduct and introduce, e.g., compliance programs. Commission settlements are similar in nature, but are reserved for major market participants, conduct in significant markets, or conduct having a significant impact upon competition. All settlements are published in the Commission's newsletter.

The Commission may also negotiate deeds with the targets of investigations in which they agree to freeze the competitive situation pending the outcome. In its submission to the Cabinet Committee in which it opposed being granted the power to issue cease and desist orders, the Commission indicated that it had managed to negotiate such deeds in the majority of cases where an interim injunction might have been sought. The Committee responded, "These deeds are negotiated within the context of the threat of court action. ...[They] are akin to cease and desist orders. In this sense empowering the Commission to impose cease and desist orders will create a greater degree of transparency in the processes and procedures of the Commission."[222]

The Cabinet Committee also invited the Commerce Commission to publish a whistleblowers program which would incorporate some of the features of the amnesty program of the United States Department of Justice. The Committee said:

> The United States Department of Justice has had a leniency program since 1993. This programme provides amnesty from criminal charges to the first conspirator to come forward in hard core cartel cases. Since the programme began, an average of one company per month in a wide variety of industries has come forward. The programme has led to the prosecution of illegal activity that the Department would never otherwise have detected. Indeed, the success of the American programme led the European Commission to adopt a formal leniency programme.
>
> The Commerce Commission can already contract and agree not to institute court proceedings against both individuals and bodies corporate in particular cases. However, it is unlikely that this informal programme would have the same impact in terms of increasing detection in comparison with an explicit and formalised programme. ...[223]

A formal leniency program was regarded as a valuable detection tool. In this sense, it would be far superior to the ability of the Commission informally to negotiate leniency in individual cases. Cabinet invited the Minister for Enterprise and Commerce to request a report from the Commerce Commission on the feasibility of establishing a transparent amnesty program.[224] To date, the proposed amendments to the Act do not contain a provision authorizing the establishment of such a program.

Table of Contents

3(c) Are Damages Awarded:

As indicated previously in this chapter, damages have not been awarded in any private action under the Act. Some actions for damages have been settled, but the terms of the settlements have been made confidential.

3(d) Cost Awards in Private Actions:

Cost awards in private actions tend to be at a nominal level. They are governed by the Second Schedule to the High Court Rules. The schedule provides for costs in the form of fixed dollar amounts for particular legal tasks.[225] The discussion document stated that it would be inappropriate to consider cost reform in the context of the Act because the High Court Rules Committee was currently reviewing inter-party costs on a wider basis.[226] The Cabinet Economic Committee review indicated that the High Court reform process would likely be completed by some time in 2000.([227]

3(e) Comparison With Costs Awarded in Public Actions:

The Commission is subject to the same costs rules as private parties. If the Commission is unsuccessful, it will be liable for costs in the same way as an unsuccessful private litigant. If it is successful, it can seek and be awarded costs.[228]

In one case, *Commerce Commission v. Hewlett Packard*,[229] Ellis J. factored into the pecuniary penalty the Commission's costs in bringing the action, which were in the order of $50,000. Later, however, in *Commerce Commission v. Wrightson NMA Ltd.*,[230] McGechan J. specifically rejected this approach, saying that he was not inclined to merge the concepts of penalty and costs. Since then, no other judge has applied the approach taken in *Hewlett Packard*.[231] This situation seems likely to continue into the future. In the current statutory review process, the option of empowering the Commission "to seek orders to recover their full investigation costs"[232] was considered and declined.[233]

Table of Contents

IV. The Role of the Commerce Commission in Private Actions:

4(a) Power to Bring Representative Actions:

Unlike Australia, New Zealand does not seem to be taking any steps toward permitting the Commerce Commission to bring representative actions on behalf of consumers and small businesses. In the statutory review process, the government did not even consider this option. Moreover, the Cabinet Committee declined to recommend an option expressly creating an ability in private parties to take class actions under the Act.[234]

4(b) Right of Intervention in Private Actions:

Under Rule 97 of the High Court Rules, the Commission could seek leave to join a private action. In considering whether to grant leave, the court would consider whether the presence of the Commission "may be necessary to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the proceeding."[235] It seems unlikely, however, that the Commission would seek to be joined in a private action in this way. Because of its limited budget, the Commission generally declines to take action where third party action is likely or has already been taken.[236]Moreover, in the statutory review the Cabinet Economic Committee declined to recommend an option allowing the Commission to act as *amicus curiae* to represent the consumer interest.[237]

4(c) Takeover of Private Actions:

It follows from the above that the Commission would not be inclined to intervene in and, ultimately, take over a private action. It seems that at most, the Commission might be inclined to institute a follow-on action for pecuniary penalties and injunction to take up where a private action left off.

The Commission appears to have done so in at least one case, *Commerce Commission v. Port Nelson Ltd.*,[238] which followed on from a private action, *Stevedoring Services v. Port Nelson*,[239] in which the plaintiffs ran out of funds after being denied an interim injunction. In the follow-on action, Port Nelson Ltd. was required to pay a $300,000 pecuniary penalty for exclusionary conduct contravening the prohibition of abuse of dominance and two $100,000 penalties for contravening the prohibition of agreements substantially lessening competition. The court also granted injunctions restraining Port Nelson from (1) offering discounts that effectively tied pilotage or towing services to other services; and, (2) refusing to hire its tugs to ships using non-Port Nelson pilots.

4(d) Power to Confer Immunity via Authorizations and Clearances:

Like Australia, New Zealand permits certain restrictive business practices and proposed mergers to be immunized from legal proceedings via authorizations or clearances. Part V of the Act vests the Commerce Commission with the power to grant authorizations for agreements substantially lessening competition (§§ 27, 28), agreements with exclusionary provisions (§29), and acts of resale price maintenance (§§ 37, 38).[240] Before issuing an authorization, however, the Commission must be satisfied that the benefit to the public outweighs the lessening of competition that would, or would likely, result.[241] The Act does not grant any express power to issue authorizations immunizing price fixing agreements (§ 30)[242] or abuse of dominant position (§ 36).

Part V of the Act also authorizes the Commission to grant clearances for proposed business acquisitions.[243] As in the case of authorizations, the Commission must first find that the public benefit from the acquisition will outweigh the likely lessening of competition.[244] It must also find that the acquisition will not create or strengthen a dominant position.[245]

Prior to the current statutory review, it was unclear whether the Commission could authorize for the future, conduct that commenced before the filing of an application for authorization. In response to a recommendation of the Cabinet Economic Committee, Cabinet agreed "to amend the Commerce Act 1986 to make it clear that the Commerce Commission can authorise future conduct even if the same conduct had been given effect to in the past."[246]

This clarification was made in § 5 of the Commerce Act Amendment Bill, which proposed to insert a new § 59A into the Act to deal with this matter.

There appears to be one recorded case in which a defendant in a private action applied for an authorization to immunize it from legal proceedings. In *Bond & Bond, Ltd. v. Fisher & Paykel, Ltd.*,[247] a terminated franchisee unsuccessfully sought an injunction against enforcement by Fisher & Paykel, a manufacturer of domestic appliances, of an exclusive dealing provision in its franchise agreement. Thereafter, Fisher & Paykel, which had a dominant position, applied to the Commission for an authorization of its practice of exclusive dealing. The Commission refused, saying that the alleged public benefits from the practice were outweighed by its anti-competitive effects.[248] On appeal, however, the High Court reversed the Commission and the authorization was granted.[249]

Appeals from the determinations of the Commission are made to the High Court.[250] The Governor General may appoint lay members to the court for purposes of assisting the judges in hearing the appeals.[251] A sitting of the court in an appeal is constituted by one judge and at least one lay member. The decision of the judge prevails where there is an equal division of opinion; otherwise the decision of the majority constitutes the decision of the court.[252] Leave may be granted to appeal to the Court of Appeal.[253]

4(e) Policy Re Taking Up Cases or Leaving Them to Private Action:

The Commerce Commission has several enforcement criteria that determine the circumstances in which it is likely to take action. It set out a number of these criteria in its Newsletter, Compliance, for April, 1999, as follows:

> **Commerce Act enforcement criteria**
>
> In deciding what action should be taken if an investigation produces evidence of a breach of the Act, the following matters are considered:
>
> - strength of the available evidence;
> - significance of the market;
> - extent and significance of the impact on competition in that market;
> - corrective action by the offending person(s);
> - conscious and deliberate breach;
> - industry-wide breaches (or similar breaches);
> - disregard for Commission policy statements;
> - precedent value; and
> - significant educational or deterrent effect. ....
>
> **Court action**
>
> Court action is likely to be undertaken where:
>
> - a precedent is sought;

> - a person has contravened the Act despite a previous warning or settlement;
> - there has been a conscious and deliberate breach of the Act;
> - there is extensive detriment to competition; or
> - a person has refused to enter into a settlement.
>
> These are, however, not the only circumstances under which court action will be taken. The decision to take court action is entered into only after the matter has been considered in terms of the enforcement criteria.

It was also indicated in a written response from the Commission in November, 1998, that an additional factor that is considered in determining whether to take court action is the likelihood of third party action.

Table of Contents

4(f) Availability of Information Collected by the Commerce Commission:

As to the availability of information to private parties, the Commerce Commission has provided the following details:

> The Commission (like most other government and quasi-government bodies in NZ) is bound by the Official Information Act 1982. That Act is founded on the principle that information is available unless there is good reason for withholding it (§ 5). The Act provides a number of grounds for withholding information, the most relevant to the Commission are maintenance of the law (§ 6 (c)), commercial sensitivity (§ 9(2)(b)), protecting confidences (§ 9 (2) (ba)) and maintaining privilege (§ 9(2)(h)).
>
> Accordingly, unless the Commission considers that one of the grounds above is made out, then even during an investigation its documents and information will be publicly available. In practice, during investigations the Commission often relies on § 6(c) to withhold information, particularly from potential defendants.
>
> After the investigation is completed and once proceedings have been instituted, defendants use the discovery process under the High Court Rules (for civil proceedings) ... to obtain all relevant material to prepare their defence.
>
> As for third parties "tapping into" the Commission's evidence, they could certainly use the OIA to request the information and the Commission would provide it (subject to any of the grounds for withholding, as above). While § 100 orders [under the Act] provide absolute grounds for withholding information, you will note they expire at the conclusion of an investigation. At that time, any confidential information previously covered by an order could be

> withheld under the relevant provision of the OIA. ....[254]

V. Case Management and Efficiency of Proceedings:

5(a) Caseflow Management & Efficiency vs. Quality of Justice:

One of the basic premises of the current statutory review was that "court processes should not hinder the goals of the Act and should balance justice and efficiency."[255] In this respect, two major concerns were expressed regarding the processing of Commerce Act cases. They were as follows:

> (1) Commerce Act cases that were litigated in the High Court were inordinately lengthy and expensive; and,
>
> (2) The tendency of the Commission to settle cases rather than litigate them meant that there were few judicial precedents to guide those who were subject to the Act and few judges in the High Court who were experienced in handling Commerce Act cases.

As previously discussed in this chapter,[256] in at least a partial response to these concerns Cabinet agreed to empower the Commerce Commission to issue cease and desist orders for contraventions of the restrictive business practice provisions of Part II of the Act, and that such orders would apply pending appeal to the High Court. It was thought that this move would reduce the cost and delay inherent in litigation in the courts and make available more reliable guidance to the business community.[257]

Cabinet did not agree to make any changes to the judicial system in the High Court. While the Cabinet Economic Committee recognized that Commerce Act cases tended to be more costly than other commercial proceedings and subject to inordinate delays,[258] it declined to recommend any improvements to the wider court system. The committee said:

> One option to reduce the cost and delay associated with Commerce Act cases would be to establish a Commercial List for the Wellington High Court. Currently a Commercial List applies only to the High Court in Auckland. The Commercial List enables commercial disputes to be decided as quickly and as cheaply as possible, by confining the action to those issues that are really in dispute. As well, by having specific Commercial List judges, this ensures that any case is more likely to be heard by a judge familiar with Commerce Act cases.... Submitters have estimated that by having cases on the Commercial List, the time involved in litigation is reduced by 12 - 18 months. However, the Department for Courts has pointed out that this improvement is more likely to reflect the gains secured through the case management programme that has operated for all civil proceedings in the Auckland High Court since 1 May 1994. ... The High Court judiciary are currently considering whether and how to introduce case management nationally. At this point, it seems likely that the judiciary will seek to do so over the

> next 12 - 18 months. The Department for Courts is supporting these judicial initiatives as a key part of that Department's change programme, which substantially redesigns court processes and introduces significant technological improvements in the Court system. ....[259]

Because the judiciary was already involved in a wide ranging program to introduce, *inter alia*, a national case management system within the next 12-18 months, the Committee essentially decided to defer to the judiciary and the Department for Courts.

Table of Contents

5(b) Experience in the High Court With Private Actions Under the Commerce Act:

In 1996, the Ministry of Commerce estimated that, on average, it took 121.4 weeks for a Commerce Act case to be litigated in the High Court.[260] According to the Cabinet Economic Committee, "this estimate ignores appeals and experience to date suggests that cases relating to network industries are often subject to the maximum number of appeals."[261] The Committee also noted that because expert economic witnesses were generally engaged in Commerce Act cases, they were relatively expensive compared to other commercial proceedings.[262]

In one case, *Shell Petroleum Mining and Todd Petroleum v. Kapuni*,[263] Barker J. issued a decision in which he criticized the parties for presenting an overkill of economic evidence. The hearing took 48 days. Six expert witnesses were called. The cross-examination of just one of these witnesses took three days. The decision suggested that in future cases, economic evidence should be heard in a roundtable manner to reduce the time spent hearing from experts.[264]

5(c) Contribution of Private Actions to Competition Jurisprudence:

Private actions have made a major contribution to competition jurisprudence in New Zealand. Virtually all of the key injunction decisions under the Commerce Act were made in private actions.[265] The only relevant Court of Appeal decision was also made in a private action , Clear v. Telecom.[266]

The Cabinet Economic Committee indicated that it regarded private actions as ideal vehicles for the enforcement of prohibitions against exclusionary conduct or other conduct directed at harming current or potential competitors. The Committee said:

> A significant proportion of anti-competitive conduct aims to exclude would be competitors or harm current competitors. Market participants can detect this type of conduct as it has an obvious economic impact on them. .... [267]

As opposed to cartel activity, which almost always occurs in utmost secrecy, exclusionary conduct is readily detected by market participants. The potential for effective response through private action under the Act was regarded by the Committee as "a necessary corollary to public enforcement in achieving an optimal deterrence to would-be offenders."[268]

The task that the Committee saw before it was to "strike the right balance between the remedies being too weak to achieve effective deterrence on the one hand, and being too attractive or strong so that private enforcement is used strategically for anti-competitive purposes on the other."[269] Its review of private enforcement indicated that, like public actions by the Commerce Commission, private actions failed to achieve effective deterrence. The remedies granted in private actions were not strong enough to effect "the deterrence of future contraventions."[270] The courts did not award damages. In considering applications for interim injunctions, the courts failed adequately to consider, inter alia, the broader interests of consumers. The costly and protracted nature of proceedings under the Commerce Act encouraged violators of the Act to adopt delaying tactics and deterred potential private plaintiffs from taking action.

In light of these observations, the Committee made a recommendation, and Cabinet agreed, to save time and cost by empowering the Commerce Commission to issue cease and desist orders that would remain in effect unless and until overturned on appeal. Cabinet also agreed to signal the courts that awarding exemplary damages was permissible in private actions under the Act and that the broader consumer interest should be considered in determining applications for injunctive relief. It will remain to be seen whether these amendments will achieve the desired balance in private actions between effective deterrence and avoidance of strategic usage for anti-competitive purposes.

Table of Contents

UNITED KINGDOM

Introduction:

Competition law in the United Kingdom is currently in a state of transition. A new Competition Act (the Act), which was designed primarily to bring domestic competition law into line with that of the European Union (EU), is being phased in over time to replace the former restrictive trade practices legislation. It is anticipated that this process will be completed by March 1, 2000.

None of the provisions of the Act expressly establishes a private right of action. The task of developing civil liability for breach of the Act has been left to the courts. It is contemplated in the Act, however, that any civil liability that is developed for breach of its provisions will be consistent with decisions of the European Court addressing civil liability for breach of the competition prohibitions of the Treaty of Rome. If this course is followed, private parties might eventually be granted standing to sue for damages, restitution, and a form of injunctive relief.

The Office of Fair Trading (the Office), which is the United Kingdom's counterpart to Canada's Competition Bureau, has not been given any role to play in private actions under the Act. Like its counterparts in Australia and New Zealand, however, the Office has the power to immunize anti-competitive conduct or arrangements from attack by issuing so-called guidances or exemptions. The Office may also impose monetary penalties upon those who breach the Act. The penalties are recoverable as civil debts.

The litigants in any private action that is developed in the courts will be subjected to a rigorous case management process. The process is designed to improve efficiency, equality and proportionality in civil actions, with resolution through litigation being regarded as a last resort. Like the Act, the process is being implemented in phases. The first phase is scheduled to be implemented on April 26, 1999.

I. Private Actions: Overview:

It is difficult to present an overview of the role of private actions in the enforcement of competition law in the United Kingdom. Parliament recently enacted a new statute, called the Competition Act 1998 (the Act),[271] to replace the United Kingdom's restrictive trade practices legislation.[272] The new statute has received Royal assent and its prohibitions are expected to come into force on March 1, 2000.

The Act does not expressly provide for a private right of action.[273] Its primary purpose is to bring domestic competition law in the United Kingdom into line with that of the European Union (EU) under Title V of the Treaty of Rome (the Treaty).[274] The prohibitions in the Act essentially mirror the prohibitions of §§ 85 and 86 of the Treaty, with amendments to reflect their application to domestic, as opposed to international, conduct.[275]

It is anticipated, however, that the courts will develop a private right of action under the Act, either by way of the tort of breach of statutory duty[276] or inference from the wording of the statute. As to the latter, the most significant provision of the Act appears to be § 58, which purports to make certain findings of fact by the Director of the Office of Fair Trading binding in proceedings for infringement of the prohibitions of the Act "brought otherwise than by the Director." This would appear to be a reference to proceedings brought by private parties.

Moreover, the Act contemplates that civil liability that is developed for harm caused by infringement of the prohibitions of the Treaty will also apply under the Act. Subsection 60(6) of the Act was inserted by Parliament at a late date in the evolution of the statute to signify this intention. It essentially provides that courts in the United Kingdom must decide questions of liability under the Act consistently with decisions reached by the European Court regarding, inter alia, civil liability for harm caused by "infringement of Community law."

Given this, it seems possible that the national courts in the United Kingdom might grant private parties standing to sue for damages, restitution[277] and a form of injunctive relief[278] for contraventions of the prohibitions under the Act. The European Court established that private parties possess the right to claim relief under the Treaty in the *Delimitis* case,[279] where the court said, "[T]he prohibitions of Articles 85(1) and 86 produce direct effects in relations between individuals, and create rights directly in respect of the individuals concerned which the national courts must safeguard."[280] It appears that to date, however, no national court in the EU has actually awarded damages for contravention of either article of the Treaty.

Prior to *Delimitis*, in 1984, the House of Lords said *in dictum* that , in its view, a contravention of the prohibition against abuse of dominance in article 86 of the Treaty would give rise to a claim for damages.[281] Thereafter, in 1998, the English Court of Appeal indicated, again *in dictum*, that a contravention of the prohibition against anti-competitive agreements in article 85 could give rise to a claim for damages or restitution, so long as the claimant was not a party to the agreement.[282]

These decisions regarding civil liability for contraventions of the prohibitions of the Treaty indicate that the courts in the United Kingdom likely will be receptive to private actions under the mirror-image prohibitions of the new Act. Precisely how the courts will rule on issues such as standing to sue and the relief to be made available to private parties remains at this point a matter of conjecture. As is the case with all statements made by courts *in dictum*, the observations of the House of Lords and the English Court of Appeal regarding the relief available under the Treaty need not necessarily be followed in subsequent cases. Only time will tell whether damages, restitution and injunctive relief will be granted in private actions under the Act in line with the observations made in the *Garden Cottages*[283] and *Gibbs Mew*[284] cases.

Table of Contents

II. The Role of the Office of Fair Trading in Private Actions:

As might be expected, the Act does not provide the Office of Fair Trading (the Office), which is the UK's counterpart to the Competition Bureau, with any express authority to intervene in or take over private actions. It also does not provide the Director of the Office with any authority to file class actions on behalf of small businesses or consumers who may have been injured by a contravention of its prohibitions.

The Director, however, has authority under the Act to immunize agreements and/or conduct from penalty by issuing guidances in response to requests from the parties, stating that they likely do not contravene the prohibitions against anti-competitive conduct or abuse of dominant position.[285] If a guidance concludes that the agreement or conduct is unlikely to infringe the prohibitions or is likely to be exempt from them, the parties are granted this immunity. The immunity continues until removed by the Director upon a reasonable suspicion that the information upon which he or she originally acted was incomplete, false or misleading in a material particular.

The Director also has authority under the Act to issue or recommend exemptions conferring immunity upon arrangements that infringe the prohibition against anticompetitive agreements. The exemptions may be of an individual, block[286] or parallel nature. Individual exemptions are granted for particular agreements. Block exemptions are recommended for categories of agreements. Parallel exemptions provide domestic counterparts to exemptions issued by the European Commission under the Treaty.[287]

In considering applications for individual or block exemptions, the Director must apply the criteria set forth in § 9 of the Act, which reads as follows:

> 9. This section applies to any agreement which -
>
> (a) contributes to -
>
> (i) improving production or distribution, or
> (ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; but
>
> (b) does not
>
> (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
> (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

Essentially, to warrant exemption the agreement must contain restrictions that are necessary to promote economic progress, give consumers a fair share of the resulting benefit, and eliminate something less than a substantial amount of competition.

The Director may also launch investigations on his or her own initiative. If the Director develops a reasonable suspicion before concluding an investigation that an infringement of the prohibitions of the Act has occurred, he may give directions to the parties to prevent irreparable damage to a particular person or protect the public interest.[288] If upon completion of an investigation the Director decides that an agreement or conduct infringes a prohibition, he or she may issue a direction to bring the infringement to an end. The direction may require termination or modification of the agreement or conduct. Should a party against whom a direction is issued default in its compliance, the Director may seek a compliance order from the courts at the cost of the defaulting party.[289]

The Director may also impose a monetary penalty upon those who are found to have infringed the prohibitions of the Act. The penalty may not exceed 10% of the turnover of the guilty party.[290] Penalties are recoverable by the Director as civil debts.[291]

Continue | **Table of Contents**

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Author - Industry Canada - Competition Bureau Publication Date - 2000-04-03

III. Case Management and Efficiency of Proceedings:

Any private actions that the courts develop under the Act will be subjected to a regime of case management designed to promote efficiency, equality and proportionality in civil actions. In July, 1996, Lord Woolf, Master of the Rolls, issued a comprehensive report on reforming the civil justice system, entitled Access to Justice.[292] Included in the report were draft civil proceedings rules which made all civil proceedings subject to the following overriding objective:

> 1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.
>
> . . . .
>
> (3) Dealing with a case justly includes -
>
> (a) ensuring, so far as practicable, that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate -
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues; and,
> (iv) to the parties' financial position;
>
> (d) ensuring that it is dealt with expeditiously; and,
>
> (e) allotting to it an appropriate share of the court's resources, while taking into ac the need to allot resources to other cases.

According to the report, the above definition of "dealing with a case justly" embodied the "principles of equality, economy, proportionality and expedition which are fundamental to an effective contemporary system of justice."[293]

Lord Woolf's report anticipated that a civil justice system underpinned by this overriding objective would result in a new landscape of civil litigation with a number of attractive features. It would avoid litigation wherever possible by encouraging the institution of legal proceedings as a last resort after failure to reach a resolution through negotiation and/or alternative dispute resolution. It would encourage more cooperation between parties, supported by active case management by judges, revised costs regimes and pre-litigation protocols on experts and disclosure. It would shorten the timescale of litigation and make it more affordable and predictable. Judges would be trained in the management of cases and encouraged to specialize in particular areas of the law to ensure full understanding of legal and technical issues.[294]

The report was welcomed by Lord Irving of Lairg, the Lord Chancellor, who made a commitment to realize the thrust of its recommendations in a program of phased implementation. In October 1997, he announced a reform program that was designed to make the most fundamental change to the English civil justice system since the 1870's.

On April 26, 1999, new rules of civil procedure implementing the first phase of these reforms will come into force. The Lord Chancellor described the new rules as follows:

> The essence of the reforms is enshrined in Part 1, which articulates that the Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly. To further the overriding objective, courts are required actively to manage cases. As part of case management, procedural judges will allocate cases to the small claims track, the fast-track or the multi-track, taking into account a number of factors, including the financial value and the complexity of the claim. Directions will be given and orders will be made which provide for parties to perform only that work which the court deems necessary to bring about a just resolution of the dispute. Managing cases in a proportionate way will exert a strong downward pressure on costs It will enable the court to reduce the scope for parties to manipulate procedure for tactical advantage. By removing unnecessary work and focusing on the issues in dispute, it will enable cases to move through the system more quickly.
>
> We must not forget, however, that we should see litigation as the last and not the first resort in the attempt to settle a dispute. That message is reinforced by the introduction of two Pre-action Protocols, covering clinical negligence and personal injury cases. The Protocols prescribe pre-action behaviour, including early exchange of information, to facilitate settlement of a dispute as soon as possible. Where compliance with a Protocol does not lead to settlement prior to the issue of proceedings, it should mean that the case is sufficiently well- prepared when it is issued to move quickly through to trial. Parties who do not comply with the Protocols will be penalised by the courts. One of the tasks for the next phase of reform is to increase the number of protocols so that the greatest possible number of cases fall within their scope. ....[295]

The reforms seek to implement the overriding objective of "dealing justly with cases" envisioned by Lord Woolfe in his report, to achieve the benefits of efficiency, cooperation and proportionality in civil proceedings. To do so, they rely heavily upon judicial case management and specialized pre-trial protocols designed to make litigation the last resort.

Table of Contents

IRELAND

Introduction:

In Ireland, competition in all but merger cases is governed by two statutes, the Competition Act of 1991 and the Competition (Amendment) Act of 1996. As in the UK, the Competition Act (the Act) essentially attempted to bring domestic competition law into line with that of the EU. There was one significant difference, however: The Act sought to rely primarily upon private plaintiffs to enforce its prohibitions. As an apparent inducement to private plaintiffs, the Act expressly provided for the award of exemplary damages.

By 1996, it became evident that reliance upon the private sector for enforcement had failed. The Competition (Amendment) Act was introduced to criminalize contraventions of the Act and expand the powers of the Competition Authority, which is Ireland's counterpart to Canada's Competition Bureau. The Authority gained broad investigatory powers and even the power to bring in its own right summary criminal proceedings against those who contravened the Act.

Unlike the ACCC in Australia, however, the Authority does not have the power to intervene in or take over private actions. It also does not have the power to bring class, or representative, actions on behalf of small businesses or consumers. As in Australia, New Zealand and the UK, the Authority has the power to issue individual or category licenses immunizing certain business conduct from the Act's prohibition of anti-competitive agreements or conduct. Immunity cannot be conferred, however, for abuse of dominant position.

The ability of private parties or interest groups to obtain injunctive relief also appears to be more limited than in Australia or New Zealand. The Act does not provide for open standing to sue. To have standing to sue for an injunction, the private plaintiff must qualify as a "person aggrieved" by the anti-competitive conduct in question, just as if he or she were suing for damages.

The Competition Authority has issued Enforcement Guidelines that, *inter alia*, set out the factors that it may consider in deciding whether to leave a case to private action. It also has given a general indication that it considers all information received pursuant to a complaint or investigation to be confidential unless used in court proceedings.

As to improving the efficiency of its judicial system, Ireland has taken several steps in this direction; however, it appears that none of the reforms to date has been directed toward the use of case management and ADR techniques to improve the rate of settlement of complex civil actions before they reach the litigation stage.

Table of Contents

I. Private Actions: Overview:

In October, 1991, Ireland introduced the Competition Act. It replaced Ireland's Restrictive Trade Practices Acts, under which various orders had previously been made to prohibit anti-competitive behaviour. The Act contained blanket prohibitions of anti- competitive conduct and abuse of dominant position that, as in the recent UK Competition Act, mirrored the prohibitions of the European Union (EU) under the Treaty of Rome.[296] Agreements that contravened the Act were deemed automatically void.

A unique feature of the Act was that the responsibility for its enforcement was placed primarily in the hands of private parties. Unlike the UK Competition Act or the Treaty of Rome, it expressly provided for a private right of action. Section 6 of the Act read, in pertinent part, as follows:

> 6.(1) Any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited under section 4 [anticompetitive agreements, decisions or concerted practices][297] or 5 [abuse of dominant position][298] shall have a right of action for relief under this section against either or both of the following, namely --
>
> > (a) any undertaking which is or has at any material time been a party to such an agreement, decision or concerted practice or has been guilty of such an abuse,
> >
> > (b) any director, manager or other officer of such an undertaking ... who authorised or consented to ... [the anti- competitive conduct].
> >
> > ....
>
> (3) The following reliefs, or any of them may be granted to the plaintiff in an action under this section:
>
> > (a) Relief by way of injunction or declaration,
> >
> > (b) Subject to subsection (6) [which precludes awarding damages for periods in which agreements, decisions or concerted practices were covered by certificates from the Competition Authority], damages, including exemplary damages.

Private parties who were aggrieved by anti-competitive conduct were granted a private right of action for relief by way of injunction, declaration and/or damages, including exemplary damages. The only restriction upon the right to damages was that damages could not be awarded for periods in which anti-competitive agreements, etc., were covered by certificates from the Irish Competition Authority,[299] which is Ireland's counterpart to Canada's Competition Bureau.

Under §§ 6(3) of the Act, the Competition Authority and the Minister for Enterprise and Employment were restricted to bringing action for civil relief by way of injunction or declaration. There were no criminal sanctions in the Act. Moreover, the Act did not grant the Competition Authority any information-gathering powers to assist it in conducting investigations or inquiries into anti-competitive conduct.

The Act provided in § 6(2)(a) for civil actions to be brought in the High Court. The High Court is the highest trial court of civil jurisdiction in Ireland. It does not have any pecuniary limits upon its jurisdiction.[300] The Act also provided, in § 6(2)(b), that abuse of dominant position actions might also be brought in the Circuit Court, which is next in stature to the

High Court, so long as the parties agreed that relief by way of damages, including exemplary damages, could exceed the pecuniary limits on the tort jurisdiction of the court.[301]

By 1996, it was evident that the statutory scheme of the Act was not working. Between 1991 and 1996, only a small number of private actions were brought. Most were "abuse of dominant position" actions against state-owned enterprises that historically had dominant positions in their markets. In the few actions that were brought, the courts tended to resile from deciding the competition issues. If a case could be made to turn on another, more familiar, ground, such as an administrative law issue, it would be decided upon that ground and the competition issues would be set aside. In the entire five-year period, the Competition Authority did not bring any civil actions for injunctive or declaratory relief.[302]

To rectify the situation, Ireland introduced the Competition (Amendment) Act of 1996 (the Amendment). The changes made by the Amendment were described as follows:

> Under the Competition (Amendment) Act, 1996 the Director of Competition Enforcement has the power to investigate alleged anti-competitive practices. The Authority has various powers to obtain information. It can summon witnesses to appear before it and require such witnesses to hand over documents in their possession. The Authority can appoint authorised officers who can obtain a warrant from a district judge to carry out a search of business premises in order to obtain evidence of a breach of the Act. ... The ...[Amendment] gives the Competition Authority power to enforce the 1991 Act. It also provides for fines of up to L3m or 10% of turnover for firms found to have breached the law. In addition it provides for fines and/or imprisonment for a director, manager or secretary of a firm who consented or connived in activities prohibited under the 1991 Act.....[303]

The Competition Authority gained broad information-gathering powers. Those who contravened the prohibitions of the Act became liable to be criminally prosecuted.[304] Substantial criminal sanctions similar to those available under the competition rules of the EU also were enacted.[305]

It seems too early to tell whether the rate of private enforcement has changed since the introduction of the Amendment. The rate of public enforcement appears, however, to have recorded a substantial increase. Recently, well-known commentators on competition law in Ireland made the following observation:

> As of 1 December 1997 no prosecution is known to have been started since the Authority and its Director of Competition Enforcement were given these powers in 1996. The Authority has obtained a High Court [interim] injunction, however, against the Road Haulage Association, to stop a boycott of Dublin Port, and it is open to the Authority to continue that action to a full trial. The Director of Competition Enforcement has used his powers of investigation to mount several 'dawn raids' and he has issued press

> statements warning that certain actions would be illegal, and announcing that actions or agreements which, in his opinion were illegal, have been stopped by the parties involved following his intervention. ....[306]

It seems that the grant to the Competition Authority of wide investigatory powers has stimulated it to use more effectively its civil injunctive jurisdiction under the 1991 Act. It also has enabled the Authority, without recourse to legal proceedings, to induce the termination of agreements or conduct which, in the opinion of the Director of Enforcement, contravened the prohibitions of the Act.

There has, however, been some indication that certain sectors of the Irish economy regard the processes of the Competition Authority to be too slow. On June 30, 1998, the Irish Telecommunications Regulator, Mrs. Etain Doyle, indicated in a speech to a Competition Convergence conference that because full competition in telecommunications was expected to be implemented in 1999, she would seek the power to impose interim settlements upon members of the industry, as well as a power to bring criminal proceedings under the Act.

The power to impose interim settlements being sought by Ms. Doyle would constitute an extraordinary quasi-judicial power. Ironically, it would be similar to a power to issue interim injunctions that was denied to the Competition Authority in the debates on the 1991 Act . Referring to the processes of the Competition Authority, Ms Doyle said, "We cannot employ cumbersome or slow processes and procedures even if they provide perfect decisions -- too late. Investors will walk away from our island."[307]

Table of Contents

II. Standing to Sue & Remedies:

2(a) Standing to Sue:

Unlike Australia and New Zealand, Ireland does not provide for open standing to sue for injunctive relief. Under §§ 6(1) of the Act, a private plaintiff must qualify as a "person aggrieved in consequence of" conduct contravening the prohibitions of the Act, regardless of whether he or she is seeking injunctive relief or damages. While there do not appear to be any Irish cases on the question, the presence of this qualification would seem to preclude the institution of actions for injunctive relief by public interest groups where the alleged contravention of the Act does not also give rise to a claim for damages on behalf of their members. If it were otherwise, the Act would not have applied the same test of standing to actions for damages as well as those for injunctive relief.

2(b) Remedies:

Turning to the matter of remedies, neither the 1991 Act nor the 1996 Amendment provides a statutory right to obtain interim injunctions or temporary restraining orders. Private plaintiffs and the Competition Authority must rely upon the exercise of the general jurisdiction of the courts to grant such relief. That such relief is available is demonstrated by the 1997 success of the Competition Authority in obtaining an interim injunction pending trial against the Road

Haulage Association to stop a boycott of the port of Dublin.[308]

It is also noteworthy that, unlike Australia, New Zealand (at present) and the UK, Ireland provided private plaintiffs with an express right under the Act to claim exemplary damages. If this was regarded as a stimulant to induce private enforcement of the Act, however, it did not appear to work. As has already been seen, only a small number of private actions were brought between 1991 and 1996.[309] This was a major factor in the decision of the Irish government to introduce the 1996 Amendment, which enhanced the power of the Competition Authority to enforce the Act in its own right.

III. The Role of the Competition Authority in Private Actions:

3(a) Power to Intervene, Etc.; Representative Actions:

Unlike Australia, Ireland did not grant the Competition Authority any express right to intervene in or take over private actions. The Competition Authority also was not granted a right to bring class, or representative, actions on behalf of consumers or small business.

3(b) Power to Confer Immunity from Legal Proceedings:

Like Australia, New Zealand and the UK, Ireland has granted the Competition Authority the power to issue individual and category licenses conferring immunity upon conduct that may contravene the § 4 prohibition of anti-competitive agreements, etc., but is regarded as providing a greater benefit to the public. The immunization of particular conduct by license prevents the filing of a private action complaining of it.[310]

In addition, the Competition Authority has the power to issue certificates certifying that agreements, etc., that have been properly notified to the Authority do not contravene the § 4 prohibition of the Act. Conduct that is covered by a certificate may still be attacked by private parties in legal proceedings under the Act; however, damages are not recoverable for the period in which the certificate is in force.[311]

3(c) Policy of the Competition Authority Re Leaving Cases to Private Action:

In 1997, the Competition Authority issued Enforcement Guidelines that summarized its views on enforcement of the Act in light of the expansion of its powers in the 1996 Amendment.[312] The guidelines gave some indication of the circumstances in which the Authority might exercise its discretion to leave a case to private action. They stated, in pertinent part:

> *Public Interest.*
>
> The Authority is funded from public funds and in exercising its discretion to use its enforcement powers in respect of breaches of the Acts it will give priority to breaches of the Act of greatest harm to the economy and consumers. ... Some breaches of competition law are immediately harmful to one person or firm, and some impact over wider more disparate groups. A private right of action exists under Section 6 in parallel with the Authority's right of action. The

Authority considers that it should give priority to breaches which would not lend themselves to the use of the Section 6 remedy in private litigation. ....

Civil enforcement.

As with criminal proceedings the Authority will take into account the public harm of the behaviour, and the public benefit of bringing proceedings, in terms of precedent and deterrent value in setting priorities for enforcement.

(i) Precedent value:

The Authority in deciding to pursue particular breaches and issue civil proceedings will take into account the precedent value of a finding by a court that the particular practice does prevent, restrict or distort competition or is an abuse of a dominant position, as a guide for business for the future.

(ii) The private right of action under Section 6.

In circumstances where a breach of the Acts causes harm to one person or firm, or an identifiable group, and there is therefore an identifiable plaintiff and identifiable significant harm to found a Section 6 action there is less reason for a public enforcement body to become involved than where the harm due to the breach is suffered across a wide range of consumers. The Authority considers that it should give priority to breaches of the Act which have the latter effect. However, this priority would not take precedence over the Authority's concern not to let a flagrant or persistent breach of the Act go unchallenged.

(iii) Discretion not to initiate proceedings.

The Authority envisages that there will be situations where parties to an anti-competitive agreement may wish to choose to cease their behaviour and give undertakings to the Authority as to future behaviour. This has the attraction of avoiding the cost of litigation but since there is no statutory basis for the enforcement of undertakings given to the Authority by firms, it will only be appropriate to accept them where this does not involve a risk of simply delaying a necessary enforcement action.

When a complaint is made to the Authority, the Authority will take into account the above factors in deciding how and whether to pursue the complaint further. Although a complaint may be made by a person or firm who considers they have been harmed by an anti-competitive practice, and who might themselves have a right of action under Section 6, the Authority's role is not as a substitute for

> that private right of action. It is not open to a complainant to seek to have the Authority 'drop' a complaint, nor will the course of action most appropriate for the Authority to follow necessarily coincide with the course of action the complainant would choose in private litigation in their own interest. ....[313]

The guidelines indicate that in deciding whether to take up a case or leave it to private action, the Competition Authority will consider:

> (1) The public harm of the behaviour and the public benefit of bringing legal proceedings, in terms of precedent and deterrent value;
>
> (2) The existence of an identifiable individual or group with sufficient incentive to sue by virtue of being significantly harmed by the anticompetitive conduct;
>
> (3) If an anticipated private action does not materialize, the presence of a flagrant or persistent breach of the Act that cannot go unchallenged; and,
>
> (4) The probability that without litigation, the Authority might successfully induce the perpetrator to cease engaging in the anti-competitive conduct and give *bona fide* undertakings as to its future conduct.

Table of Contents

3(d) Availability to Private Parties of Information Collected by the Authority:

> Because Ireland only recently granted the Competition Authority the power to conduct investigations, etc., the Authority has not fully dealt with this question. Indications are, however, that the Authority prefers to keep confidential all of the information that it collects pursuant to complaints or the investigation phase of its proceedings. In a recent address, the Chairman of the Competition Authority, Professor Patrick McNutt, said:
>
> The Authority will have to evaluate the effectiveness of disclosure with respect to establishing appropriate safeguards on the disclosure, the use of shared information and the identity of the complainant or whistle-blower. ... If the Authority brings a civil case, the defendant will be free to seek discovery of our files and the question whether the Authority is obliged to disclose the identity of the whistle-blower is again one for each judge to resolve on a case by case basis.
>
> There may have to be a distinction between the types of information disclosed, for example, there could be 'investigation-confidential'

> information, that is confidential only because and in the sense that it is obtained during an investigation. .... Authority enforcement has to be conducted on a confidential basis. .... The investigative power enables the Authority to acquire files and documents under warrant; the third party source of information is new evidence; critical information from third parties, any evidence of anti-competitive agreements or communications among competitors, may be crucial for an investigation. ....
>
> The enabling legislation provides that the Authority may conduct investigations and collect information and evidence. The Act could be amended to allow a section which provides that 'investigative-confidential' information cannot be disclosed other than in court proceedings where all documents are used in evidence. Furthermore that the Authority shall not be compelled to disclose information received pursuant to complaint unless disclosed in court proceedings. The Authority needs information to take action and since we have transparency in the system, once we take action, its in a public court and all information is in the public domain.....[314]

Professor McNutt suggested that the 1996 Amendment be changed to provide that "investigative-confidential" information and information received pursuant to a complaint cannot be disclosed unless used in court proceedings.

IV. Case Management and Efficiency of Proceedings:

There does not appear to be much indication that the Irish judicial system is being reformed, as in the UK and Australia, to improve the rate of settlement of civil actions before they reach the litigation stage. In 1995, the Minister for Justice, Mrs. Nora Owen, established a Working Group on a Courts Commission to study the reform of the court system; however, the published literature suggests that the major reforms that have been implemented to date involve the provision of new rules for the District Court, which does not have jurisdiction over competition cases; the design of an independent Courts Service; recommendations regarding judicial conduct and ethics; and, the appointment of additional judges and support staff.[315]

The latter reform, the Minister noted in a recent address, had produced significant results. She said:

> I am very pleased to say that this investment [in appointing additional judges and support staff] is producing the desired results of clearing the existing backlogs in the Courts. For example, in the Dublin Circuit Court, I understand that new litigants in civil cases can now obtain a Court date within 6 weeks of lodgement of their case. This compares with a delay of 2 years last July. In Family Law cases the delay in the Dublin Circuit Court has been reduced from 16 months to 4 months and delays in the hearing of criminal cases have been eliminated.

> Delays in the hearing of personal injury actions in the High Court have been reduced from 35 months to 20 months and delays in the hearing of cases in the Central Criminal Court have been reduced to as low as 6 months in some cases. ....[316]

Backlogs and delays in the courts were substantially reduced.

Table of Contents

UNITED STATES

Introduction:

Private treble damage actions, as well as actions for injunctive or other equitable relief, have been accessible under the antitrust laws of the United States since the Sherman Act was enacted in 1890. For several decades after these actions became available to the private sector, however, very few private antitrust suits were filed. It was not until after the Second World War, in the 1950's and 1960's, that the private sector initiated a virtual avalance of private antitrust actions that ultimately became responsible for most of the major developments in antitrust law in that period.

Over more than the past 25 years, private actions have constituted in excess of 90 % of all antitrust cases filed in the United States. They outnumber public sector actions by a ratio of 9:1. While almost 90 % of them are either settled or dismissed before trial, and over 70 % of litigated cases result in judgment for some or all of the defendants, private antitrust actions remain a potent force on the legal landscape of the United States.

While the potential for the recovery of treble damages is, in itself, a significant incentive to sue, the United States provides still further incentives. Treble damage plaintiffs benefit from an express statutory right to fee shifting, under which their reasonable legal fees must be paid by the defendants if the plaintiffs prevail. This statutory right does not provide any benefit to defendants. Even if they prevail, they are subject to the traditional American rule, which requires the parties to bear their own costs of litigation. In addition, private antitrust plaintiffs may take advantage of liberal access to class action status.

There appears, however, to be little cooperation between the public and private sectors in the enforcement of antitrust law. The public sector is not inclined to share information from its investigations with potential private plaintiffs. There is no momentum, as there appears to be in New Zealand, toward having the courts take into account the wider interests of all consumers in determining private applications for interim injunctions. The public sector, in the form of the Justice Department and the Federal Trade Commission, regards itself as the legitimate protector of the public interest and weilds a vast array of criminal, civil and administrative weapons in its efforts to do so.

I. Private Actions: Overview

1(a) Conduct Actionable by Private Parties:

In the United States, private parties may sue for any injury to business or property resulting from a contravention of the antitrust laws, Section 4 of the Clayton Act[317] provides as follows:

> (a) Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.
>
> ....[318]

Any activities forbidden by the antitrust laws may be the subject of a treble damage civil action. The cause of action is extended to "any persons". There is no stipulation that the person seeking a remedy need be a natural person. Any individual or corporation may have standing to initiate a private action pursuant to this provision.[319]

The only "antitrust" Act to which to private right of action does not apply is the *Federal Trade Commission Act* (FTCA).[320] The FTCA is not included within the definition of "antitrust laws" under the Act. The term "antitrust laws" is defined as follows:

> §12. "Antitrust laws", as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved
>
> July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled ?An Act to reduce taxation, to provide revenue for the Government, and for other purposes', approved February twelfth, nineteen hundred and thirteen; and also this Act.[321]

The FTCA falls outside the scope of this provision.

1(b) In Practice, the Kinds of Actions Private Parties Tend to Bring:

(1) Generally:

The primary study on the American experience with private actions was the Georgetown Project. [322] The Georgetown Project drew many conclusions from a statistical significant number of cases (2,357). The project examined private anti-trust actions file in the years 1973-83 in the Districts of Southern New York, Northern Illinois, Northern California, Western Missouri, and Northern Georgia.[323] It developed several sets of statistical results, the first of which was a breakdown of numbers of claims by cause of action.

The statistics for causes of action were summarized in the following table:

Defendant's Conduct	*Percent*
Horizontal Price Fixing	21.3
Vertical Price Fixing	10.3
Dealer Termination	8.9
Refusal to Deal	25.4
Predatory Pricing	10.4
Asset or Patent Accumulation	5.6
Price Discrimination	16.4
Vertical Price Discrimination	5.8
Tying or Exclusive Dealing	21.1
Merger or Joint Venture	5.8
Inducing Government Action	0.8
"Conspiracy"	5.9
"Restraint of trade"	10.0
"Monopoly" or "Monopolization"	8.8
Other	8.9

Tying, refusal to deal and dealer termination accounted for 55.4% of the causes of action that were brought.

The Georgetown Project also derived statistics upon the relationship of plaintiffs to defendants. They are summarized as follows:

Business Relationship[325]

Alleged Illegal Practice Information	**Stand-Alone Competitor**	**Vertically Integrated Competitor**	**Direct Customer**	**Supplier**	**Final Customer**	**Other**	**No**
Horizontal Price Fixing	7.2%	22.0%	24.0%	19.4%	0.4%	20.4%	4.8%
Vertical Price Fixing	6.9	13.0	19.2	5.4	6.9	6.6	0.7
Dealer Termination	1.6	1.6	22.6	4.3	0.0	2.0	0.7
Refusal to Deal	23.4	40.6	35.3	31.2	12.6	23.7	0.7
Predatory Pricing	23.2	11.8	8.5	8.6	3.4	2.0	1.5
Asset Accumulation	9.6	12.2	3.2	4.3	3.4	3.3	1.1

Price Discrimination	16.2	25.2	23.6	15.1	14.9	4.0	2.2
Vert. Price Discrimination	5.3	10.2	9.2	4.3	1.1	2.6	0.7
Tying/Exclusive Dealing	22.3	22.8	30.7	21.5	17.2	14.2	3.7
Merger/Joint Venture	13.8	6.3	3.0	4.3	4.0	4.0	0.4
Induce Govt. Action	1.8	1.2	0.4	0.0	0.0	1.3	0.0
"Conspiracy"	8.0	6.6	4.6	8.6	6.9	8.6	1.1
"Restraint of trade"	13.1	11.0	9.0	11.8	8.0	13.8	2.7
Monopolization"	15.2	12.2	7.2	3.2	6.3	7.9	2.6
Other	11.6	10.6	5.5	12.9	8.0	23.0	1.1
No Information	2.7	3.4	0.9	2.2	2.3	4.0	84.4

Refusal to deal allegations were made by vertically integrated competitors, direct consumers, and suppliers: each representing over 30% of the allegations that were made. As to tying and exclusive dealing, direct consumers made 30% of the allegations, with competitors making 45.1% of the allegations. Suppliers and final customers accounted , respectively, for 21.55 and 17.2% of the allegations.

(2) Elapsed Time Between Initiation and Resolution:

The Georgetown Project determined that the average civil action took 757 days to reach a conclusion at a total litigation cost between $200,000 and $280,000. [326]

(3) Proportion of Private Actions Resulting in Consent Orders, Settlements, Etc:

(a) General Settlement Rates

The Georgetown project derived the following statistics for settlements in general. [327]

	Broad Definitions of Settlement[328]		Narrow Definition of Settlement[329]	
	Terminated Cases	**Litigated Cases**	**Terminated Cases**	**Litigated Cases**
Settlement in General	88.2%	–	70.8%	–
Judgment for all or some plaintiffs	3.3%	28.1%	3.3%	11.3%
Judgment for all or some defendants	8.4%	71.4%	25.9%	88.4%
Judgment for some plaintiffs and some defendants	0.1%	0.5%	0.1%	0.2%

According to the Georgetown Project, there is a general settlement rate between 88.2% and 70.8% in private antitrust suits, depending upon whether a broad or narrow definition of settlement is employed.[330]

(b) Settlement Rates Specific to Tied Selling and Refusal to Supply

Just as general figures were collected by the Georgetown Project, settlements and judgments were collected and broken down by their alleged practices.[331] The following table illustrates the results:

	Broad Definitions of Settlement[332]		Narrow Definition of Settlement[333]	
	Settlement Rates	Judgment for Plaintiffs	Settlement Rate	Judgment for
Horizontal Price Fixing	84.2%	24.6%	68.3%	12.3%
Vertical price fixing	88.5%	19.0%	72.5%	8.0%
Dealer Termination	86.2%	43.5%	74.5%	23.8%
Refusal to Deal	85.6%	25.4%	68.6%	11.6%
Predatory Pricing	92.9%	23.1%	77.6%	7.3%
Price Discrimination	88.9%	43.4%	73.0%	14.1%
Tying/Exclusive Dealing	87.7%	28.9%	72.3%	12.7%

According to the table, the settlement rate for refusal to deal would fall between 85.6% and 68.6%. The settlement rate for tying would be between 87.7% and 72.2%. The Georgetown project also suggested that the settlement rate was not so much driven by the merits of the cases but rather by the cost of the litigation and the impact on future cases. [334] The higher the cost of litigation or the more adverse the impact on future cases, the less likely the chances of litigation to completion.

The settlement rate, it should be noted does not appear to be as high as the general settlement rate for civil actions in Ontario. In Ontario, the settlement rate for civil actions is about 95%.[335]

1(c) Where Private Actions Are Commenced:

Private actions alleging contraventions of the federal antitrust laws of the United States must be brought in the federal judicial system. In the federal system, the territory of the United States is divided into a number of districts. Each district has a trial court called a United States District Court. Generally, the district courts preside over actions brought by plaintiffs within their respective territories.

At the appellate level, the United States is divided into a number a larger entities called circuits. Most circuits encompass a number of districts. An appeal from a decision of a district court may be taken to the appellate court for the circuit containing that district. Each appellate court is called the United States Court of Appeals for that particular circuit. From there, appeals may be taken directly to the Supreme court of the United States.

It should be noted, as well, that many American states have their own antitrust statutes and deal with local anti-competitive activity. When the parties to a private action under a state antitrust statute are citizens of that state, the action must be brought in the courts of that state. Where there is diversity of citizenship between them, however, the action may be brought in the federal judicial system to ensure fairness in the proceeding.

1(d) Relative Number of Private to Public Actions:

Following is a statistical breakdown of the numbers of private to public actions brought in the United States from 1970-1995:[336]

Year	Total Antitrust Cases	Private Cases	Percentage of Private Cases
1970	929	877	94.40%
1971	1505	1445	96.01%
1972	1379	1299	94.20%
1973	1206	1152	95.52%
1974	1270	1230	96.85%
1975	1431	1375	96.09%
1976	1555	1504	96.72%
1977	1658	1611	97.17%
1978	1477	1435	97.16%
1979	1284	1234	97.11%
1980	1496	1457	97.39%
1981	1352	1292	97.56%
1982	1066	1037	97.28%
1983	1213	1192	98.27%
1984	1124	1100	97.86%
1985	1082	1052	97.23%
1986	877	838	95.55%
1987	785	758	96.56%
1988	682	653	95.89%
1989	658	639	97.11%
1990	472	452	95.76%
1991	681	650	95.45%
1992	503	483	96.02%
1993	701	685	97.72%
1994 9	708	672	4.92%
1995	775	745	96.13%
Averages	1032.19	995.11	92.78%

The ratio of private cases to the total of antitrust cases in the United States has averaged 92.78% over the last 25 years (data was not available after 1995). The simple ratio is approximately 9:1 (private: public).

1(e) Length of Time Private Action in Place:

The United States has provided a private right of action for treble damages for over 100 years, ever since the introduction of its first antitrust statute, the *Sherman Act*, on July 2, 1890. The private right of action was initially established in § 7 of this statute. In 1914, this provision was superceded by § 4 of the *Clayton Act*; [337]

Continue| Table of Contents

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Canadä
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Author - Industry Canada - Competition Bureau Publication Date - 2000-04-03

II. Standing to Sue:

Although the private right of action is broadly applicable, the Supreme Court of the United States has imposed restrictive standing and remoteness of injury rules in an attempt to control the number of private actions making their way through the courts.[338] The court has stated that "there is a point, beyond which the wrongdoer should not be held liable" [339] and that "it is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." [340]

Definitive rules determining private antitrust standing have yet to be crystallized by the Supreme Court. Several approaches have been used. The current theme is that standing is limited to consumers or competitors in the market that is targeted by the alleged antitrust violation. [341] This restriction places primary reliance on the *AGCC* case. [342] That case set out the following factors to be applied flexibly on a case-by-case basis in determining standing: (1) Whether the plaintiff's injury is of the type Congress sought to redress; [343] (2) Whether the defendant intended to harm the plaintiff; [344] (3) The directness or indirectness of injury; [345] (4) The existence of other persons more directly injured who are likely to sue; and, [346] (5) Whether the claim involves speculative harm, duplicative recovery, or a complex apportionment of damages. [347]

Table of Contents

III. Remedies:

3(a) Remedies Available to Private Litigants:

(1) Treble Damages:

Closely linked to the restrictive approach of U.S. courts toward standing to sue, is the availability of treble damages. Under §4 of The Clayton Act, "any person who shall be injured by reason of anything forbidden in the antitrust laws" may sue for "threefold the damages by him sustained." The windfall to plaintiffs of the treble damage awards; the potentially ruinous consequences to defendants; and, concerns about preventing duplicate recovery by direct purchasers and consumers, have caused the courts narrowly to circumscribe the circle of plaintiffs who have standing to sue. [348]

A treble damage plaintiff must also prove that the antitrust violation was the "more substantial cause" of the claimed injury than any other factor.[349] So long as the damages are "definitely attributable to the wrong", however, uncertainly as to their amount will not defeat the plaintiff's case. [350]

(2) Interim and Permanent Injunctions

Section 16 of The Clayton Act provides for injunctive relief as follows:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff. [351]

Unlike the provisions for injunctive relief in the Australian and New Zealand Acts, §16 does not provide for open standing to sue. Only those who are threatened with "loss or damage by a violation of the antitrust laws" may obtain injunctive relief. [352]

Section 16 of The Clayton Act provides for both interim and permanent injunctive relief. To obtain interim relief, in the form of a preliminary injunction, the plaintiff must execute "proper bond against damages for an injunction improvidently granted and ....[show] that the danger of irreparable loss or damage [from the antitrust violation] is immediate.

Section 16 is not regarded as authorizing the issuance of injunctive relief on behalf of the public. To become entitled to injunctive relief, a plaintiff must show that he or she is threatened with a special injury differing from that which might be suffered by the public at large. [353] This is a consequence of the requirement of § 16 that injunctive relief be granted "when and under the same conditions and principles as injunctive relief against threatened conduct what will cause loss or damage is granted by courts of equity."

(3) Class Actions:

The antitrust laws do not contain any specific provisions relating to class actions. Class actions must be taken under Rule 23 of the Federal Rules of Civil Procedure. Rule 23 provides, in pertinent part, as follows:

> Rule 23. Class Actions [354]
> One or more members of a class may sue or be sued as representative parties on behalf of all only if:
> (1) the class is so numerous that joinder of all members is impracticable,
> (2) there are questions of law or fact common to the class,
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
> (4) the representative parties will fairly and adequately protect the interests of the class.

There must be questions of law or fact that are common to a class of persons too numerous to permit joinder of their causes of action. Moreover, the representative parties must have claims or defenses that are typical of the class and be in a position adequately to protect the interests of the class.

In addition, the parties seeking certification as a class must show that:

1. Separate actions would create a risk of inconsistent adjudications; [355] or,
2. Adjudications in individual actions would risk disposing of the interests of non-parties; [356] or,
3. Injunctive or declaratory relief with respect to the class is appropriate because the party opposing the class has acted on grounds generally applicable to the class; [357] or,
4. Common questions of fact or law predominate over individual questions, and a class action is superior to other methods for fair and efficient adjudication of the controversy. [358]

3(b) Remedies Available to the United States:

(1) Criminal Prosecution:

Criminal prosecutions are usually brought by the Antitrust Division of the U.S. Justice Department under the Sherman Antitrust Act,[359] which outlaws "all contracts, combinations, and conspiracies that unreasonably restrain interstate trade. [360] It also outlaws the monopolization of any part of interstate commerce. [361] Violations are prosecuted as criminal felonies. Corporations can be fined up to $10 million for each offence. Individuals can be fined up to $350,000 and sentenced to up to 3 years in federal prison.[362]

The Justice Department's "number one antitrust priority" is criminal prosecution of bid rigging and price fixing.[363] These practices are considered to be the most harmful to freely competitive markets. It was recently noted that:

> The Department has obtained price-fixing and bid- rigging convictions in the soft drink, motion picture, trash-hauling, road-building, electrical contracting the dozens of other industries

> involving hundreds of millions of dollars in commerce. And in recent years, grand juries throughout the country have investigated possible violations with respect to fax paper, display materials, explosives, plumbing supplies, doors, aluminum extrusions, carpet, bread, and many more products and services. The Department also has recently been investigating and prosecuting bid rigging in connection with Defense Department and other government procurement....[364]

Moreover, since May 3, 1988, the Division has filed 134 bid-rigging cases against dairy companies across the United States, involving 81 corporations and 84 individuals Criminal fines of more that $69.8 million have been levied and more that 29 individuals have been sentenced to jail.[365]

The Antitrust Division has also engaged in an extensive and sophisticated criminal enforcement effort against international cartels. In a recent address, [366] Mr. Joel I. Klein, the Assistant Attorney General in charge of the Antitrust Division, said:

> Today, we have more than thirty grand juries throughout the nation, looking at cartels involving companies in more than twenty different countries, some in industries that do over a billion dollars of annual commerce in the U.S. alone. In our last fiscal year (ending on September 30, 1997) we brought in more that $200 million in criminal fines - - five times greater than our previous high - - and I expect that we will soon see guilty pleas or prosecutions in some additional, high visibility cases....[367]

Guilty pleas and prosecutions, accompanied by the imposition of significant criminal fines, are expected to increase.

(2) Damages:

Under section 4A of the *Clayton Act*, the United States is entitled to sue for its actual damages whenever it is injured in its business or property by a violation of the antitrust laws. ([368]

(3) Injunctions and Divestiture Orders:

The United States may also sue for injunctive relief under § 15 of the *Clayton Act*. A federal injunctive proceeding has long been regarded as, in substance, "a public prosecution, with civil rather than criminal sanctions, for vindication of public right and for redress and prevention of public injury.[369] It is not regarded as performing the same function as the narrower private action for an injunction.[370] As a result, the relief obtained by the United States may include orders requiring positive acts to restore competition, including divestiture or disposal of part of a business; dissolution or discontinuance of all or part of a business; division of a business into two or more independent entities; or compulsory licensing of intellectual property.

In 1993, the then Assistant Attorney General in charge of the Antitrust Division, Anne K. Bingaman, indicated that one of her key priorities would be to bring significant civil cases. She said:

> We will now focus our attention on filing significant civil cases which involve large volumes or commerce. By "significant", I mean that the Division should focus on cases that are highly visible, enhance the competitiveness of markets, establish broad legal precedents, and that will have a significant import on a large number of consumers. The airline price-fixing and coordination case brought by the previous Administration serves as a good example of what I consider to be a "significant" case.... The fact that a case may have a large potential impact on consumers and producers should not engender paralysis of enforcement with....[T]he Antitrust Division will not flinch from instituting a case merely because it will require a large commitment of our resources......[371]

A special group was formed within the Antitrust Division to develop significant civil non-merger cases. [372]

(4) Consent Decrees:

The vast majority of civil cases brought by the Antitrust Division have been settled by consent decree before any testimony is taken and without trial of the issues raised in the action. The main reason for this is found in § 5(a) of the Clayton Act, which provides that "consent judgments or decrees entered before any testimony has been taken" do not constitute *prima facie* evidence against the defendant in any follow-on treble damage actions. [373] Because numerous treble damage actions follow-on after a successful action by the United States, this device is attractive to many antitrust defendants.

Consent decrees may be modified by the courts in response to changed conditions. Decrees generally contain reservation of jurisdiction clauses permitting the United States to return to court to modify their provisions or apply for enforcement of compliance. Violation of a consent decree opens the violator up to contempt proceedings,[374] although this recourse has seldom been invoked.[375]

(5) Cease and Desist Orders:

One of the responsibilities of the Federal Trade Commission (FTC) [376] is to prevent through civil action unfair methods of competition which at the same time constitute violations of the antitrust laws.[377] In the civil regime, its powers overlap many of those of the Antitrust Division of the Justice Department.

The FTC was envisioned by President Woodrow Wilson, *inter alia*, "as an instrumentality for doing justice to business where the processes of the courts or the natural forces of corrections outside the courts are inadequate to adjust the remedy to the wrong in a way that meets all the equities and circumstances of the case.[378] Its power to issue cease and desist orders may be said to serve this goal. [379]

An FTC complaint seeking the issuance of a cease and desist order is initially heard by an FTC Administrative Law Judge. [380] The defendant has thirty days to file an answer to the complaint. If no answer is received within this time period or the defendant does not contest the complaint, the Administrative Law Judge will issue his or her decision. If the complaint is contested, the counsel for the FTC, who bears the burden of proof, must be prepared immediately to go ahead with the case. The Administrative Law Judge will conduct a hearing which is similar to a trial and then issue an initial decision. The decision is reviewable by the Commission, although the Administrative Law Judge has all of the powers necessary to fulfil his or her position. [381]

A cease and desist order from the FTC may be judicially reviewed in the appropriate United States Court of Appeals. The petition for review must be made within sixty days from the date of of service of the order. [382] To ensure speedy resolution of these petitions, the FTC Act provides that they "shall be given precedence over other cases...and shall be in every way expedited.[383]The cease and desist order does not become final until the exhaustion of the appeal process.[384]

Table of Contents

(6) Civil Penalty For Violations of Cease & Desist Orders:

Those who violate cease and desist orders after they become final may be sued in Federal Court for a civil penalty.[385] In such actions, the courts may also grant mandatory injunctions and further equitable relief deemed appropriate to the enforcement of the orders.[386]

(7) FTC Temporary Restraining Orders and Preliminary Injunctions:

The Commission may seek to enjoin a violation or threatened violation of the antitrust laws "pending the issuance of a complaint by the Commission and until such complaint is dismissed.....or the order of the Commission made thereon has become final.[387] To do so, however, the Commission must bring an action to enjoin the violation in a district court of the United States. The court may grant a short-term temporary restraining order, and later, a preliminary injunction, without the provision of any bond by the Commission. [388] The burden upon the Commission is to show that, "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." [389]

(8) Administrative Enforcement:

(a) Justice Department:

(1) Corporate Leniency Policy:

The Antitrust Division has a Corporate Leniency policy under which it will grant amnesty to corporations that confess to violations of the antitrust laws. Initially, amnesty was only available to those who confessed prior to the commencement of an investigation. Amnesty was automatic, granting complete protection from criminal prosecution to all officers, directors and employees who cooperated. Since the amnesty program was expanded in August, 1993, automatic amnesty remains available as before; however, the Division will consider granting amnesty to potential defendants who come forward after commencement of an investigation, so long as they are "in a position to offer the government important and valuable cooperation."[390]

> The criteria that the Division uses in deciding whether to grant amnesty are as follows:
>
> (1) at the time the corporation comes forward, the Division has not received information about the activity from any other source;
>
> 1. the corporation, on discovery of the illegal conduct, must take prompt and effective action to terminate its participation in the illegal activity;
> 2. the corporation must report the wrongdoing with candor and completeness and provide full, continuing and complete cooperation throughout the subsequent investigation;
> 3. the confession must truly represent a corporate act, as opposed to isolated confessions of individual employees acting on their own;
> 4. where possible, the corporation must make restitution to injured parties; and
> 5. the corporation must not have coerced another party to participate in the illegal activity and must not have been the leader in, or originator of, the misconduct....[391]

The corporate amnesty program has been one of the most successful programs of the Antitrust Division. In a recent address, Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, praised its success, saying:

> Today, the Amnesty program is the Division's most effective generator of large cases, and it is the Department's most successful leniency program. Amnesty applications over the past year have been coming in at the rate of approximately two per month – a more than *twenty-fold* increase as compared to the rate of applications under the old Amnesty Program. Given this remarkable rate of amnesty applications, it certainly appears that the message has been communicated......
>
> First and foremost, the Division has been highly successful recently in cracking antitrust conspiracies and obtaining heavy fines against the participants. In the last two years, the Division has obtained nearly a half-billion dollars in criminal fines. To put these criminal fines in perspective, the total fines imposed on corporate defendants in the *past two years* is virtually identical to the total fines imposed in all of the Division's prosecutions during the *20 years* from 1976

> to 1996. In fact, in FY 1998, the average criminal fine imposed on corporations was roughly $12 million, a nearly *fifteen-fold* increase as compared to just two years earlier, FY 1996. Thus, for a company facing the possibility of a heavy criminal fine, the opportunity to self report and pay *zero* dollars in criminal fines is one that simply shouldn't refuse......
>
> The early identification of antitrust offenses through compliance programs, together with the opportunity to pay zero dollars in fines under the Division's Corporate Amnesty program, has resulted in "a race to the courthouse," to use the words of an experienced antitrust attorney quoted in the Forbes article. We frequently see situations where a company approaches the government a few days, or even less than one full day, after one of its conspirators has already approached the Division and secured its position as first in line for amnesty. Of course, as in all things, time is everything. In two recent cases, being second in the door ended up costing companies tens of millions of dollars in fines as well as criminal exposure for the culpable executive.....[392]

Amnesty applications have become the most effective generators of large cases. They have increased more than twenty-fold, and the program has even resulted in a "race to the courthouse," to be first to approach the government.

(2) Individual Leniency Policy:

On August 10, 1994, the Antitrust Division established an Individual Leniency Policy [393] for those who did not qualify for amnesty as officers, directors or employees of corporations under the Corporate Leniency Policy:

The Individual Leniency Policy provides in pertinent part, as follows:

> Requirements for Leniency for Individuals
>
> 1. Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun, if the following three conditions are met:
> 2. At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
> 3. The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete;
> 4. The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.
>
> (b) Applicability of the Policy

Any individual who does not qualify for leniency under Part A of this Policy will be considered for statutory or informal immunity from criminal prosecution. Such immunity decisions will be made by the Division on a case-by-case basis in the exercise of its prosecutorial discretion.

If a corporation attempts to qualify for leniency under the Corporate Leniency policy, any directors, officers or employees who come forward and confess with the corporation will be considered for leniency solely under the provisions of the Corporate Leniency Policy.

(3) Business Review Letters:

Business review letters [394] may be issued for proposed business conduct; however, the Division may refuse requests for such letters. The letters set forth the current enforcement intentions of the Division regarding the proposed conduct; however, they reserve to the Division the right to take appropriate action that subsequently appears to be in the public interest. The letters and business review requests are made public upon request. Supporting documents are made public within 30 days of release of a letter. They remain public for one year thereafter, and are then returned to the requesting party or destroyed.

(b) Federal Trade Commission:

The Commission has three methods of administrative enforcement; (1) negotiating administrative consent orders; (2) issuing advisory opinions; and, (3) making Trade Regulation Rules.

(1) Administrative Consent Orders:

The administrative consent order is the primary administrative enforcement tool of the Commission. A proposed consent order may be mailed to a respondent with a warning that an FTC complaint might ensue. The respondent is given 10 days to agree to enter into consent negotiations or face a formal complaint before an Administrative Law Judge. If the respondent opts to negotiate a consent order, and an order is executed and approved, the respondent is regarded as not having admitted to any violation of the law; however, the respondent must agree to stop the injurious practices. [395] The Commission is not estopped from reopening the case at a later date. This process has been extensively used by the Commission.

(2) Advisory Opinions:

Advisory opinions may be issued by the Commission regarding proposed business conduct, so long as the matter involves a substantial or novel question and is of significant interest to the Commission. The opinion letters advise the parties of the potential problems the Commission sees in their proposed course of conduct and the Commission's enforcement intentions regarding such conduct. [396]

There are two varieties of advisory opinions: staff and Commission. The latter are reserved for the more important matters. Most advisory opinions are staff letters. The Commission may later rescind or revoke its letters, but will not proceed against a requesting party for actions taken in good faith reliance upon a letter. The letters, requests and documents received from requesters are placed in the Commission's public record immediately after receipt by the requesting parties of the Commission's advice. Reasonable requests for confidentiality are, however, respected.[397]

Table of Contents

(3) Trade Regulation Rules or Guidelines:

The Commission may also issue rules or guidelines to help mitigate the hardship upon an individual corporation that has been ordered to cease and desist using a practice that their competitors would remain free to use until subjected to similar action. [398] The rules or guidelines are designed to eliminate and prevent such practices on an industry-wide basis. They constitute the Commission's concept of the substantive requirements of, *inter alia*, the antitrust laws it administers.

For unfair or deceptive practices, but not in competition matters, the Commission may make Trade Regulation Rules which have the force of law. [399] A full public hearing must be held before such rules are made. The rules may be challenged in any of the courts of appeal in the federal judicial system. [400]

(c) Coordination Between the FTC and Antitrust Division:

Because the FTC and the Antitrust Division "have concurrent statutory authority to enforce §2,3,7, and 8 of the *Clayton Act* [and] judicial interpretation of §5 of the *FTC Act* permits the FTC to challenge conduct that also may constitute a *Sherman Act* violation," [401]the overlap between their jurisdictions requires coordination between them to ensure efficiency in allocation of resources and fairness to the subjects of investigation.

> The process of coordination between the two agencies have been described as follows:
>
> > Traditionally, duplication of investigations has been avoided in two areas. First, pursuant to a liaison agreement, the Department has referred all civil *Robinson- Patman Act* matters to the FTC for action, and, second, the FTC routinely refers possible criminal violations of the antitrust laws, such as price fixing, to the Division. (The Procedure to be followed on criminal referrals is discussed below.) The two agencies enforce the balance of the antitrust laws–particularly merger investigations (§7 of the *Sherman Act*)–concurrently.
> >
> > (i) FTC Liaison and Clearance Procedures
> >
> > Coordination is accomplished through the "clearance procedure." This procedure was established pursuant to an interagency agreement to determine, as each case arises, which agency would be the more appropriate one to handle the matter. The first interagency agreement was informally instituted in 1938 and, since 1948, it has

> been modified and formalized by several exchanges of correspondence between the Assistant Attorney general for Antitrust and the correspondence between the Assistant Attorney General for Antitrust and the correspondence between the Assistant Attorney General for Antitrust and the Chairman of the FTC. On December 2, 1993, the FTC and DOJ jointly issued "Clearance Procedures for Investigations." These procedures, among other things, state the criteria for resolving "contested matters" -- matters on which both agencies have sought clearance. On March 23, 1995, the FTC and DOJ jointly announced "Hart-Scott-Rodino Premerger Program Improvements."; these improvements included a commitment by each agency to resolve clearance on matters where an HSR filing was made within, at most, nine business days of filing.
>
> The agencies have agreed to seek clearance from each other in the following instances: (1) where either proposes to investigate a possible violation of the law; and (2) where either receives a request for a statement of agency enforcement intentions, i.e., the Division's Business Review or the FTC's Advisory Opinion procedures......[402]

A review of the Federal Trade Commission's enforcement efforts over the past few years indicates that considerable resources have been devoted to mergers and the review of pre-merger notifications under the *Hart-Scott-Rodino Act*. [403] The Antitrust Division also engages in reviewing merger activity, but appears to have focused much of its program of enforcement upon criminal actions against international cartels, as well as the prosecution of price fixing and bid rigging cases.[404]

3(c) Damage Awards:

While most treble-damage actions are settled or dismissed before trial, [405] there seems to be little doubt that since World War II, numerous treble damage actions resulted in the award of substantial damages. In the post-war period, "it was in the context of private litigation that the Supreme Court enunciated most of its important antitrust decisions. The private cases involved price

fixing, monopolization, predatory pricing, price discrimination, dealer terminations, tying, and boycotts. Had there been no private cause of action under the antitrust laws, much of the development in antitrust doctrine during that period might never had occurred. [406]

3(d) Cost Awards in Private Actions:

While the potential for gaining treble damages might appear to be a great attraction for plaintiffs, Congress recognized that other considerations might still deter private attorneys general

from bringing suit. "Relative financial size of the parties, the costs of gathering evidence, the need for a demonstrable injury are factors usually weighted against the plaintiff. To help balance the scales, the plaintiff...[was] allowed costs and reasonable attorney's fees."

The private plaintiff's entitlement to this recovery was expressly provided in §4(a) of the *Clayton Act*. When it was enacted in 1914, the *Clayton Act* was one of few fee-shifting statutes in in the United States. Fee-shifting statutes alter the traditional "American Rule" in litigation matters, under which each party assumes its own legal costs. [408] Like the *Clayton Act*, most authorize fee awards to prevailing plaintiffs. Some, however, authorize such awards to prevailing defendants. [409]

Even in the absence of a fee-shifting statute, the federal courts made fee awards in appropriate cases by invoking their inherent equity powers and authority to control misconduct.[410] In the early 1970's, a number of courts even began to make fee awards to prevailing plaintiffs whose lawsuits advanced important public policies. This became known as the "private attorney general" doctrine. [411]

In 1975, however, the Supreme Court of the United States rejected the doctrine. [412] It held that in the absence of specific statutory authorization, the courts could not make fee awards to prevailing plaintiffs in public policy lawsuits. Since the ruling, the number of fee-shifting statutes in the United States has increased from several dozen to almost 200.[413]

Table of Contents

3(e) Comparison With Costs Awarded in Public Actions:

The United States is not statutorily authorized to recover fee awards in its actions, whether they are civil or criminal [414] in nature. To recover a fee award the United States would have to invoke the court's inherent equity powers or authority to control misconduct.

IV. The Role of the United States in Private Actions:

4(a) Power to Bring Representative Actions:

Theoretically, it might be possible for the United States to bring a *parens patriae* action on behalf of all persons in the country who were injured by an antitrust violation. In practice, however, this does not happen. The perspective of the Antitrust Division appears to be that every action it brings, whether civil or criminal, is on behalf of the citizens of the United States.[415]

4(b) Right of Intervention in Private Actions:

Generally, the Justice Department does not intervene in a private action at the trial level. If, however, the determination of particular issues at trial would impact upon a government action that was proceeding simultaneously, the Department might intervene to request the court to hold the private action in abeyance pending the outcome of the government's case. It would not seek to take over the private action.

The Justice Department is much more active at the appellate level. Under the Federal Rules of Appellate Procedure, the United States is entitled to intervene as *amicus curiae* in private actions as a matter of right. [416] The Appellate Section of the Antitrust Division operates an *amicus curiae* program under which appeals in private actions are reviewed to determine whether to file a brief and appear as *amicus curiae*. The primary determinant of whether the Justice Department will intervene is the existence of a clear issue of law upon which the Department wishes to be heard. [417]

If a private action proceeds to the Supreme Court the United states is not automatically entitled to appear as a matter of right. It seems likely, however, that in every such instance the government would apply to the Court to be granted status as *amicus curiae*. At this level, the Solicitor General must make the application and appearance on behalf of the United States.[418]

4(c) Power to Confer Immunity From Legal Proceedings:

Neither the Justice Department nor the FTC has any power to confer immunity from legal proceedings by issuing authorizations or similar devices. [419]

4(d)Policy of the United States re Taking Up Cases or Leaving them to Private Action:

The Justice Department has not have any official policy governing when cases will be left to private action. In various public statement, however, it has indicated the types of actions upon which it intends to concentrate its resources. On the criminal side, the Department appears to be focusing its attention upon bid rigging, price fixing and the activities of international cartels. [420] On the civil side, the Department appears to be focusing its attention upon bringing non-merger cases that are highly visible, establish broad legal precedents, and have a significant impact upon consumers. [421]

4(e) Assistance to Private Parties:

The Justice Department offers little assistance to parties who have filed or are contemplating filing private actions. When it proceeds criminally, the Justice Department makes use of the grand jury procedure. Evidence adduced before a grand jury is subject to strict secrecy rules which remain in force after conclusion of the proceeding. To obtain access to grand jury evidence, the private plaintiff would be required to make application to the federal court in which the grand jury proceeding was held and show good cause as to why the evidence should be released. [422]

In civil non-merger cases, the basic discovery tool of the Department is the Civil Investigative Demand. The Civil Investigative Demand process has its own secrecy rules which eliminate the possibility of public access to the evidence. [423]

One form of assistance that the Department currently provides to private parties is to refuse to accept plans of *nolo contendere* in criminal prosecutions. The defendants must plead guilty. [424] Several years ago, pleas of *nolo contendere* were accepted. The pleas could not be used in follow-on private actions as *prima facie* evidence against the defendants within the meaning of §5(a) of the *Clayton Act*. Guilty pleas constitute *prima facie* evidence of an antitrust violation under §5(a) and, as a result, may be of considerable assistance to private plaintiffs. According to the most recently available statistics, follow-on actions constituted between 11.2% and 5.9% of private actions initiated between 1973 and 1983. [425]

Table of Contents

V. Case Management and Efficiency of Proceedings:

5(a) Caseflow Management & Alternative Dispute Resolution:

In 1990, Congress enacted the *Civil Justice Reform Act* (CJRA) [426] to study the causes of cost and delay in civil litigation. The CJRA required all ninety four federal district courts to implement "civil justice expense and delay reduction plans" that would "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes." [427]

Under the CJRA, each district court was expected to develop an individualized plan for expense and delay reduction after consultations with an advisory group. Ten district courts were designated as pilot courts and were required to implement such plans. Many district courts created differentiated case management (DCM) systems, with cases being placed in different tracks according to their nature and complexity. Virtually all of them implemental alternative dispute resolution (ADR) programs, of which court-hosted settlement conferences and mediation proved the most popular. Twenty district courts provided mandatory or voluntary court-based arbitration. Others employed private ADR procedures. [428]

In June, 1997, the Judicial Conference Administrative Office submitted to Congress its final report on the experience of the federal courts in applying the CJRA's cost and delay reduction measures. The report also included a series of recommendations to further the goal of efficient case management. These recommendations are as follows:

- Continue the CJRA Advisory Group process, which has proven to be one of the most beneficial aspects of the act by involving litigants and members of the bar in the administration of justice;
- Continue the act's public reporting of caseflow management statistics due to their effectiveness in reducing case disposition time;
- Encourage early and firm trial dates and shorter discovery periods in complex civil cases;
- Encourage the effective use of magistrate judges consistent with Recommendation 65 of the Long Range Plan for the Federal Courts;
- Increase the role of district chief judges in case management;
- Encourage intercircuit and intracircuit judicial assignments to promote efficient case management;
- Increase education regarding efficient case management;
- Where appropriate, encourage the use of electronic technologies in the district courts;
- Encourage prompt executive and congressional action to fill judicial vacancies;
- Encourage Congress to consider the impact legislation will have on court

dockets; and
- Encourage Congress to consider the impact on litigation cost and delay if sufficient courtroom space is not available.....[429]

5(b) Amendments to the Discovery Rules in the Federal Rules of Civil Procedure:

In 1993, several amendments were made to the discovery rules in the federal judicial system. These amendments included initial disclosure requirements, expert witness disclosure, meet-and-confer requirements, discovery planning, limits on deposition conduct, and limits on interrogatories. The effectiveness of the amendments was evaluated by the Federal Judicial Center in 1997. [430]

The Federal Judicial Center study found that, [g]enerally, discovery expenses represented 50% of litigation expenses and 3% of the amount at stake in the litigation. [431] It also found that "[t]he total cost of litigation is most strongly associated with several other cost variables, especially the size of the monetary stakes." [432]

The most controversial amendment was the initial disclosure requirement,[433] under which the parties in each district could opt into a procedure requiring counsel to make early disclosure of specific types of information without requests from opposing counsel. The study found that initial disclosure was attractive to many litigants and had been used by 89% of the lawyers who responded to the survey.

5(c) Summary Judgment, Groundless Litigation and Offers of Settlement:

The Federal Rules of Civil Procedure contain other mechanisms to help ensure the efficient processing of civil actions. Among them are Rule 56, which provides for motions for summary judgment to resolve matters without the necessity of a trial; Rule 11, which seeks to deter the filing of groundless litigation by imposing sanctions upon the offending party; [434] and, Rule 68, which seeks to encourage settlement by permitting a defendant to make a settlement offer which, if equal to or greater than the ultimate judgment, requires the plaintiff to pay the costs incurred by the defendant after the offer was made and rejected. [435]

5(d) Experience in the Courts With Private Antitrust Actions:

As previously indicated in this chapter, private antitrust actions in the United States outnumber public actions by a ratio of 9:1. [436] They generally settle at a rate of between 88.2% and 70.8%, depending upon whether a broad or narrow definition of settlement is employed.[437]

In the period 1973-1983 refusal to deal, dealer termination and tying actions accounted for 55.4% of all private actions. The settlement rate for refusal to deal was between 85.6% and 68.6%. For tying actions, the settlement rate was between 87.7% and 72.2%. The average private action took 757 days to reach a conclusion at a total litigation cost of $200,000. to $280,000. [438] No more recent statistics appear to be available.

5(e)Contribution of Private Actions to Antitrust Jurisprudence:

There seems to be little doubt that in the United States, private antitrust actions have made a substantial contribution to the development of antitrust jurisprudence. In the post-World War II period, most of the Supreme Court's important antitrust discussions were made in the context of private actions. These decisions involved price fixing, monopolization, predatory pricing, price discrimination, dealer termination, tying arrangements and group boycotts. [439]

Table of Contents

COMPARATIVE ANALYSIS

Introduction:

A comparison of private enforcement in the jurisdictions in the study provides the following results, which may be of considerable use in the design of a private right of access to the Competition Tribunal for the non-criminal provisions of Canada's Competition Act:

I. Enforcement Philosophy:

All of the jurisdictions in the study, except the United Kingdom, regard private actions as a desirable supplement to public enforcement. Some have even gone farther than this. They have moved toward adopting a philosophy of cooperative enforcement between the public and private sectors, in which the private sector is granted a larger role in protecting the public interest. The primary incentive for moving toward this philosophy appears to be a recognition that the public sector cannot achieve optimal enforcement of competition law on its own. This inability appears to be due, for the most part, to budgetary constraints.[440]

As is illustrated in Table 1, below, Australia and New Zealand seem to have gone the farthest in moving toward cooperative enforcement. Australia and New Zealand grant private parties open standing to apply for injunctive relief. Applications may be made by "any person," which would include public interest groups, consumer groups and trade associations. Applicants are not required to prove that they were injured by the alleged contravention or possess an otherwise special interest in the application. The provision of open standing has not led to the filing of futile or vexatious litigation.[441]

Table 1: Standing to Sue

Type of Relief	Australia	New Zealand	United Kingdom	Ireland	United States
Damages	Injured Plaintiff	Injured Plaintiff	--	Aggrieved Plaintiff	Injured Plaintiff
Injunction	Open Standing	Open Standing		Aggrieved Plaintiff	Plaintiff with Threatened Injury

A proposed amendment to New Zealand's Commerce Act will make it clear that private actions for interim injunctive relief are regarded as protecting the wider public interest. The amendment will require the courts to weigh the interests of all consumers in deciding whether to grant an interim injunction. To do otherwise, a Cabinet discussion paper indicated, would risk permitting defendants to continue subjecting all consumers to non-recoverable damages by persisting in imposing higher prices, reduced output, productive inefficiencies and delayed innovation pending an often-distant final decision in the case.[442]

Ireland's experience appears to confirm that optimal enforcement of competition law requires both public and private participation. From 1991 to 1996, Ireland relied entirely upon the private sector to enforce its competition laws. To encourage private enforcement it provided for the award of exemplary damages. Nevertheless, few private actions were filed, and in 1996, Ireland was forced to amend its Competition Act to provide for public sector investigations and criminal prosecutions.[443] The reason for the lack of private enforcement activity is not clear; however, it may be noted from Table 1, above, that Ireland does not provide for open standing to sue for injunctive relief. It requires the private plaintiff to be a "person aggrieved."[444]

While the United States may be said to stimulate private antitrust actions by granting treble damages and liberal access to class action status, it does not seem to view such actions as part of a cooperative effort to protect all consumers. The issues in treble damage actions are narrowly confined to conduct that injured the plaintiffs. The same is true in actions for injunctive relief. Private parties are not granted open standing to sue, as they are in Australia and New Zealand. To obtain injunctive relief, they must prove that they were subjected to threatened injury by the alleged contravention of the antitrust laws. The threatened injury must be "special," in the sense of being different from that which might be suffered by the public at large.[445]

The closest that the federal government of the United States has come to relieving the pressure upon its budget through cooperative enforcement has been to increase cooperative activities with state antitrust authorities. All but a few of the states of the United States have their own antitrust laws, which apply to intra-state commerce. They mirror in several respects the Sherman and Clayton Acts. In a recent address, William J. Baer, Director of the Bureau of Competition of the Federal Trade Commission noted, "In each of the four years I've had this job, the number of cases jointly investigated by the States Attorneys General and FTC staff has increased. This past year, we worked closely with a number of states in funeral home, supermarket, oil and gas, and hospital mergers. We jointly litigated the Poplar Bluff case with Missouri and are joining forces with 32 states in the Mylan case."[446]

The United Kingdom is alone in its lack of reliance upon the private sector. Its new Competition Act does not provide a statutory right to private action. The Act relies for enforcement upon a rigorous public regime, under which the Director of the Office of Fair Trading is empowered to issue a direction, which is a form of cease and desist order, terminating what the Director decides is a contravention of the Act. Even more significantly, the Director is empowered to impose pecuniary penalties of up to 10% of the turnover of the guilty parties.[447] The United Kingdom is the only jurisdiction in the study to grant such an extraordinary power to an administrator. In all other jurisdictions, the power to impose penalties is left to the courts.[448]

Table of Contents

II. Extent of Cooperative Enforcement:

(1) Information Sharing:

Even in New Zealand, which seems to have gone the farthest toward adopting the philosophy of cooperative enforcement, the extent of cooperation between the public and private sectors has not advanced much beyond granting open standing to sue for injunctive relief and proposing to require the courts to give weight to the interests of all consumers when deciding private applications for interim injunction. To date, there has been little cooperation in providing private parties with access to information gathered in public sector investigations. Obtaining access to this information is attractive to private parties because the public sector's investigatory powers are wider than those permitted the private sector in discovery proceedings.[448] Reducing duplication of effort by the public and private sectors may also help to reduce a major cost factor in private actions, and hence, a significant disincentive to private enforcement.[449]

While perhaps appropriately enough, New Zealand is the most liberal jurisdiction in the study in its official approach toward sharing information from Commerce Commission investigations with the private sector, it provides the Commission with several grounds for withholding it. In practice, these grounds are often invoked by the Commission.[450]

In Australia, the Australian Competition and Consumer Commission routinely refuses to provide actual or potential private litigants with the information it collects in its investigations. It takes the position that to do so would deter people from providing information to the Commission, lead to a drain on its resources, and stimulate challenges that the Commission was seeking information on behalf of third parties. Nevertheless, the Australian Law Reform Commission recommended that it be empowered to share its information with the private sector if certain conditions were satisfied. To date, this recommendation has not been acted upon by the Australian government.[451]

In Ireland, the power of the Competition Authority to conduct investigations is so new (1996), that it does not appear to have formulated precise guidelines governing the sharing of information with the private sector. The present tendency, however, appears to be to refuse to disclose information obtained in an investigation unless made public through use in a court proceeding.[452]

Likewise, in the United States, information obtained in investigations is not disclosed by the Justice Department unless made public in court proceedings. Criminal investigations are conducted through grand jury proceedings, which remain impressed with secrecy even after the grand jury is completed. Civil investigations are conducted through the use of Civil Investigative Demands, which are impressed with their own secrecy rules.[453]

(2) Other Forms of Cooperation:

All of the jurisdictions in the study except the United Kingdom and Ireland afford some assistance to private parties who wish to file follow-on actions after the successful completion of a public sector case. In Australia, for example, the Trade Practices Act essentially provides that a finding of fact in the prior action constitutes prima facie evidence of the fact in the follow-on action.[454] In the United States, the assistance is more substantial. The Clayton Act makes a final judgment in a government criminal or civil action prima facie evidence of the antitrust violation in a follow-on action. To provide further assistance to private parties, the Justice Department currently adheres to a policy of refusing to settle criminal cases unless the defendant enters a guilty plea, which may used as prima facie evidence of the violation.

Continue| Table of Contents

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Publication Date - 2000-04-03

III. The Distribution of Enforcement Power Between the Public and Private Sectors:

The distribution of enforcement power is heavily weighted toward the public sector. In no other aspect of the relationship between the public and private sectors is it made clearer that the private sector remains very much the junior partner. All of the jurisdictions in the study grant the

public sector considerably more power to enforce competition law. The difference in power is not necessarily located in the range of contraventions that may give rise to public or private action. It is primarily located in the remedies that are available to the public and private sectors. The public sector is granted more formidable and far-reaching remedies than the private sector. Alongside this remedial arsenal stands a stockpile of established administrative mechanisms that assist the public sector in making its enforcement powers even more effective.

The following tables help illustrate the difference in power between the public and private sectors in the jurisdictions in the study: Table 2 shows the contraventions of competition law that are the subject of both public and private enforcement. Table 3 shows the remedies that are available to the private sector. Table 4 shows the remedies that are available to the public sector. Table 5 shows the established administrative mechanisms that are available to assist the public sector in the exercise of its power.

Table 2: Contraventions Subject to Public and Private Enforcement:

Contravention	Australia (Trade Practices Act)	New Zealand (Commerce Act)	United Kingdom (Competition Act)	Ireland (Competition Act, 1991)	United States (Antitrust Laws)
Conspiracy Substantially Lessening Competition	§§45,45B	§§27,28		§4	Sherman Act, §1
Refusal to Deal (Group Boycott)	§§45,45D	§29			Sherman Act, §1
Horizontal Price Fixing	§§45,45A	§§30,34		§4	Sherman Act, §1
Resale Price Maintenance	§48	§§37-42			Sherman Act, §1
Price Discrimination Act	§49			§4	Clayton Act, §2 Robinson-Patman
Exclusive Dealing	§47	§§27,28 or 36,36A			Clayton Act, §3
Tied Selling	§§47(7)-((9)	§§27,28 or 36,36A		§4	Clayton Act, §3

Abuse of Dominant Position	§§46,46A	§§36,36A		§5	Sherman Act, §2
Merger/Joint Venture	§§50,50A	§§47,48			Sherman Act, §1

Table 3: Private Sector Remedies:

Remedy	Australia	New Zealand	United Kingdom	Ireland	United States
Treble Damages					Yes
Exemplary Damages		Proposed		Yes	
Single Damages	Yes	Yes		Yes	
Interim Injunction	Yes	Yes		Yes	Yes
Permanent Injunction	Yes	Yes		Yes	Yes
Declaration	Yes	Yes		Yes	Yes
Remedial Orders	Yes	Yes			Narrow
Divestiture Order (Mergers)	Yes				
Class or Representative	Yes (Conservative Access)	Yes(Highly Restricted Access)			Yes (Liberal Access)
Consent Orders	Yes	Yes			Yes

Table 4: Public Sector Remedies:

Remedy	Australia	New Zealand	United Kingdom	Ireland	United States
Criminal Fine				Yes	Yes
Imprisonment				Yes	Yes
Civil Pecuniary Penalties	Yes	Yes	Yes		
Interim Injunctions	Yes	Yes	Yes	Yes	Yes
Permanent Injunction	Yes	Yes	Yes	Yes	Yes
Declarations	Yes	Yes	Yes	Yes	Yes
Consent Orders	Yes	Yes		Unknown	Yes
Mandatory Restoration of Competition Orders	Yes	Yes	Yes	Yes	Yes
Divestiture Orders (Mergers)	Yes	Yes	Yes	Yes	Yes
Orders Prohibited Indemnification of Pecuniary Penalty		Proposed			
Orders Prohibiting Violators From Directing, Managing Corporations	Proposed	Proposed			
Parens Patriae Actions for Damages to Consumers					Possible
Representative Actions for Damages to Small Business, Consumers	Possible & proposed				

Table 5: Public Sector Administrative Mechanisms

Administrative Mechanism	**Australia**	**New Zealand**	**United Kingdom**	**Ireland**	**United States**
Leniency Programs		Proposed			Yes
Informal Warnings	Yes	Yes			
Administrative Undertakings or Settlements	Yes	Yes		Unknown	Yes
Voluntary Freezes on Competitive Situation Pending Investigation	Unknown	Yes		Unknown	Yes
Involuntary Freezes on Competitive Situation Pending Investigation			Yes		
Non-Binding Letters of Advice	Yes			Unknown	Yes
Binding Letters of Advice or Guidances			Yes		
Cease & Desist Orders or Directions	Considered by Law Reform Commission & Rejected	Proposed Amendment	Yes	Requested by Comp. Auth.& Denied	Yes
Pecuniary Penalties			Yes		

Table 2 demonstrates that in most jurisdictions in the study, both the public and private sectors are empowered to sue for a broad range of contraventions of their respective competition laws, including refusals to deal (or group boycotts) and tied selling.[455] A comparison of Tables 3 and 4, however, shows that in most jurisdictions the "heavy artillery", in the way of remedies, is reserved to the public sector.

First, in Australia, New Zealand, and the United Kingdom, the public sector has exclusive jurisdiction over the recovery of penalties. These penalties may be substantial. In Australia, the Competition and Consumer Commission can recover from corporate defendants up to $10 million for each contravention.[456] In the United Kingdom, the Director of the Office of Fair Trading may impose a penalty of up to 10% of the turnover of the guilty party.[457] In New Zealand, the Commerce Commission may recover up to $5 million for each contravention. Proposed amendments to the Commerce Act will, if enacted, increase the penalty to up to three times the illegal gain or 10% of annual turnover.[458]

Only in the United States might a private plaintiff recover a penalty approaching these levels. Even then, an order to pay treble damages may fall short of the mark. Treble damages are one part compensation and only two parts penalty. Moreover, they are confined to the illegal gain made at the expense of the individual plaintiff, not the illegal gain made by the defendant overall. A private penalty in the form of exemplary damages, such as that which exists in Ireland and is proposed for New Zealand, would, in all likelihood, fall even farther short of the mark than treble damages.[459]

Secondly, in virtually every jurisdiction in the study, only the public sector has the power to obtain the most far-reaching remedy known to competition law: orders directing steps to be taken to restore competition in the market, up to and including dissolution and divestiture. The sole exception is Australia, which narrowly empowers private parties to seek orders directing the divestiture of shares or assets acquired in contravention of the merger provisions of the Trade Practices Act.[460] While Australia and New Zealand authorize their courts to make broad remedial orders in private actions under their competition laws, the remedial orders that are contemplated appear to be confined to redressing the specific injury suffered by the plaintiff at the hands of the defendant by, e.g., voiding or varying contracts, or directing the payment of refunds. Even these slender powers have seldom been exercised by the courts.[461]

Finally, only the public sector has an established array of administrative mechanisms to assist it in exercising its powers. While some mechanisms, such as administrative undertakings, may be said to be equivalent in nature to settlement agreements or consent orders negotiated in private actions, others, such as the cease and desist order powers that exist in the United States and the United Kingdom, and are proposed for New Zealand, are extraordinary. They vest the administrative body with a quasi-judicial power that has been seen to be a most effective weapon in the enforcement of competition law.[462]

Table of Contents

IV. Prohibitions Most Suitable to Private Enforcement:

It follows from the above discussion that the private sector, and in particular, small business, might have found the private right of action, with its more limited discovery mechanisms and less incisive remedies, to be more useful in dealing with some types of anticompetitive conduct than others. The study appears to bear this out.

Table 6, below, suggests that private actions have been found to be very useful in addressing conduct that may be satisfactorily dealt with by obtaining interim and/or permanent injunctive relief.[463] Types of conduct that appear to fit within this category include tied selling, exclusive dealing and refusal to deal (group boycott).

Table 6: Anticompetitive Conduct Actually Addressed in Private Actions:

Administrative Mechanism	Australia	New Zealand	United Kingdom	Ireland	United States
	(Current / Brunt Study)				
Conspiracy	41.2% 41.0%	High Number of of Cases			21.3%
Refusal to Deal	(Included in Consipracy)	(Included in Conspiracy)			25.4%
Horizontal Price Fixing	5.9% 2.0%				21.3%
Resale Price Maintenance	6.7% 4.9%	One Case			10.3%
Price Discrimination And/Or Predatory Pricing	10.1% 10.8%				26.8%
		(Included in			

Exclusive Dealing	27.7% 19.6%	Conspiracy, Abuse of Dominance)		21.1%
Tied Selling	5.0% (Included in in Exclusive Dealing)	(Included in Conspiracy, Abuse of Dominance)		(Included Exclusive Dealing)
Abuse of Dominance (Monopolization)	3.4% 19.6%	Majority of Cases	Majority of Cases	8.8%
Merger/Joint Venture	2.0%			5.8%

Table 6 suggests that in Australia, New Zealand and the United States, tied selling, exclusive dealing and refusal to deal actions make up at least 40 - 50 % of the private actions that are filed. Note that in jurisdictions whose statutes do not expressly prohibit tied selling, exclusive dealing and refusal to deal, like New Zealand, the conduct is addressed in conspiracy and/or abuse of dominance actions.

The relatively high degree of concentration of private actions in the above areas might also be expected for another reason. The private sector has also been recognized as being better equipped than the public sector to detect anticompetitive conduct that "aims to exclude would be competitors or harm current competitors. Market participants can detect this type of conduct as it has an obvious economic impact on them."[464] Tied selling, exclusive dealing and refusal to deal are among the types of anticompetitive conduct that have an obvious economic impact upon market participants.

Table of Contents

V. Focus of Public Enforcement Activity:

Given the superiority of market participants in detecting anticompetitive conduct having an economic impact upon them, the public sector may be expected to focus its resources upon hard-core cartel conduct, which is difficult to detect because it involves a high level of secrecy. Hard core cartel conduct includes price fixing, bid rigging, output limitation agreements and horizontal market division. These types of conduct are more successfully detected and remedied through public action.

The above expectation appears to be borne out in the study. Research data from Australia indicate that from 1990 to January, 1999, most public sector cases involved allegations of price fixing, conspiracy and resale price maintenance.[465] In New Zealand, the deterrence of hard core cartel conduct became one of the top priorities of the public sector. To assist in this effort, the government proposed amendments to the Commerce Act making price fixing, bid rigging, output limitation agreements and horizontal market division per se offences.[466] Because of the difficulty of detection due to the secrecy involved in such conduct, the government made a proposed amendment extending the limitations period in which the Commerce Commission was required to act. It also proposed that the Commission consider publishing an amnesty program to encourage voluntary disclosure of illegal activity by cartel participants.[467] The United States has also given priority to policing by the public sector of cartel activity.

Enforcement criteria published by some jurisdictions, such as Australia, New Zealand and Ireland, indicate that several additional factors might be considered before public action is undertaken in any particular case. The factors include the likelihood of private action; the impact of the conduct upon competition; the deliberateness, flagrance and persistence of the breach; the existence of similar breaches industry-wide; the potential precedential value of a decision; and, the potential educational or deterrent effect of the case.([468]

Although the Justice Department of the United States does not publish enforcement criteria, it has indicated in public statements that it is focusing its criminal prosecutions upon price fixing, bid rigging and international cartel activity.[469] On the civil side, the Department is focusing on cases that are highly visible, enhance the competitiveness of markets, establish broad legal precedents, and have a significant impact on a large number of consumers. These are said to be "significant" cases.[470] The Justice Department and the Federal Trade Commission also expend considerable resources in evaluating and challenging merger activity.

Table of Contents

VI. Cost Reduction in Private Enforcement:

(1) In General:

Most of the jurisdictions in the study displayed a keen interest in reducing the cost and delay inherent in competition cases and other complex civil litigation. It has been recognized that competition cases are among the most complex and expensive of civil litigation matters. They usually require multiple expert witnesses. They are lengthy and hard-fought contests with high stakes and myriad factual issues. It is not unusual for more than 50% to be taken on appeal. The available information from Australia, New Zealand and the United States indicates that proceedings at the trial stage may take upwards of two years and appeal processes may take two or more years to be completed.[471]

Several steps have been taken to reduce the duration and expense of all complex civil actions, including competition cases. In Australia, the Federal Court, which hears, inter alia, competition cases, adopted in 1977 a detailed caseflow management system to minimize delays and provide parties with early hearing dates. Thereafter, it established specialist panels, with 12 judges currently on the competition panel. In 1987, it established an assisted dispute resolution program under which the court was empowered to stream cases into court-annexed mediation or arbitration programs. [472]

In New Zealand, the High Court in Auckland has established a case management program and a Commercial List to which, inter alia, Commerce Act cases are assigned. This provides a procedure for resolving, inter alia, competition disputes as quickly and cheaply as possible. Commercial List Judges are also most likely to have expertise in competition matters. Further reforms are currently being considered by the High Court Judiciary.[473]

In 1996, the United Kingdom embarked upon a wide-ranging revision of its civil proceedings rules after publication of a report by Lord Woolf, Master of the Rolls, entitled Access to Justice. The civil justice system envisioned in this report would encourage litigation as a last resort after failure to reach a settlement through negotiation and/or alternative dispute resolution. Active case management would be instituted, judges would be encouraged to specialize, and revised discovery and cost regimes would be implemented to shorten the time scale of litigation and make it more affordable. The courts in the United Kingdom are currently involved in implementing these recommendations.[474]

In 1990, the United States enacted the Civil Justice Reform Act, which required all of the federal courts in the country to make similar revisions to their rules of civil procedure. The district courts set up advisory committees and, based upon their recommendations, implemented improvements to their discovery rules, cost regimes, alternative dispute resolution options, and civil processes which were not necessarily identical to those of other federal courts. These changes are being evaluated on an on-going basis for their contribution to reducing the length and expense of complex civil actions.[475]

No amendments were proposed to the costs indemnity rule of the courts, under which the losing party must pay the "costs" of the prevailing party This rule applies in all jurisdictions in the study except the United States;[476] however, it does not seem to be regarded as a major disincentive to the litigation of competition cases. The costs recovery often is as little as 40% of the successful party's actual litigation costs. Some costs are discretionary with the court. The costs of investigation are not recoverable under the costs indemnity rule.[477]

(2) Antitrust-Specific Cost Reduction:

Some jurisdictions have existing or proposed antitrust-specific provisions to reduce the duration and expense of competition cases. In 1996, the Australian Law Reform Commission proposed to alleviate the litigation expense to individual claimants by ensuring that the Australian Competition and Consumer Commission was empowered to bring representative, or class, actions on behalf of small businesses and consumers. It also proposed that the rules of civil procedure be changed to ensure that consumer and business organizations were empowered to bring representative actions for damages on behalf of their memberships.[478]

New Zealand took a different tack. It was acknowledged that there were several litigation disincentives discouraging the filing of both private and Commerce Commission actions, and in particular, applications for interim injunction. These disincentives included, inter alia, high litigation costs; severe financial risks to plaintiffs from having to give undertakings to pay damages to defendants for interim injunctions that were improvidently granted; and, difficulty in damage actions in proving a causal connection between the claimed injury and the alleged contravention of the Act.[479] Cabinet, however, declined to fall in line with the Australian approach toward alleviating these disincentives by liberalizing New Zealand's restrictive class action rules. It proposed two very different amendments: First, to empower the Commerce Commission to issue cease and desist orders;[480] and, second, to permit private parties to claim exemplary damages. [481]

It was thought that empowering the Commission to issue cease and desist orders would all but eliminate the necessity for the Commission to go to court to apply for interim injunctions.[482] As to private parties, it appears to be a reasonable inference that New Zealand anticipated that they would opt for the cheap alternative of applying for an investigation leading to a cease and desist order rather than seeking interim relief in court. Finally, empowering private parties to claim exemplary damages enhanced the incentive to file private damage actions and counterbalanced the disincentive derived from the causation requirement.[483]

The cease and desist order alternative proposed by New Zealand was heavily influenced by the perceived success of the United States Federal Trade Commission in issuing cease and desist orders against anticompetitive conduct. The Federal Trade Commission's cease and desist orders were said to be highly effective, low cost, and seldom appealed to the courts.[484]

Table of Contents

VII. Governmental Oversight of Private Actions:

(1) Intervention:

As to governmental oversight of private actions, virtually every jurisdiction in the study allows the government, like any other entity or person, to seek court permission to intervene in a private action. Some jurisdictions, however, have gone much farther. In Australia, the Trade Practices Act expressly grants the Australian Competition and Consumer Commission the power to intervene as of right in private actions involving restrictive trade practices. It is even theoretically possible for the Commission to take over a private action. These powers, however, have seldom, if ever, been used.[485]

In the United States, Rule 29(a) of the Federal Rules of Appellate Procedure expressly grants the government the power to intervene as *amicus curiae*, or "friend of the court," in appeals of federal trial court decisions in private antitrust cases. When it chooses to exercise this power, the Justice Department files a brief addressing the issue(s) it has selected and appears at the hearing to present oral argument. The main criterion determining whether the Department will intervene in this fashion is the existence of a clear legal issue upon which the Department wishes to be heard.[486]

(2) Immunization from Legal Proceedings:

All of the jurisdictions in the study except the United States empower their competition authorities to immunize anticompetitive conduct from legal proceedings under their competition laws. To obtain this protection, the applicant must show that efficiency gains or other public benefits derived from the conduct outweigh its anticompetitive effects. These protections are called authorizations (Australia, New Zealand); exemptions (United Kingdom); or, licenses (Ireland). They have been little used in the context of private actions. In Australia, only one defendant in a private action attempted to use this mechanism -- unsuccessfully -- to escape liability in legal proceedings[487] In New Zealand, a corporation that successfully withstood one private action ultimately obtained an authorization to forestall future litigation from other quarters.[488]

Table of Contents

VIII. Preventing Strategic Use of Private Actions for Anticompetitive, Unmeritorious or Frivolous Purposes:

Virtually every jurisdiction in the study recognizes that it is crucial to achieve effective private enforcement while at the same time preventing private actions from being used strategically for anticompetitive purposes.[489] It was for this reason that in 1977, Australia eliminated the private right of action for injunctive relief in merger cases.[490] In New Zealand, Cabinet rejected the option of deterring anticompetitive conduct through private treble damage actions for fear that "the potential of a windfall gain ... [would] encourage the use of litigation for strategic purposes ... [and induce firms] to over comply with the Act, choosing safe conduct that is further from the efficient level in an attempt to reduce their financial exposure from a possible action."[491] Apparently motivated by similar concerns, the courts in the United States have erected substantial barriers to access to private treble damage actions through strict interpretation of the threshold requirement of standing to sue.[492]

The courts of the various jurisdictions have at their disposal a number of effective judicial mechanisms for filtering out strategic, unmeritorious or frivolous claims. The mechanisms range from mild procedural devices, such as directions hearings, case management conferences, references to dispute resolution and motions for summary judgment,[493] to harsh disciplinary responses, such as striking out matters for being an abuse of process or making punitive costs orders against parties and counsel who make frivolous claims, engage in misconduct or cause undue delay.[494]

IX. Design Guidance: Effectiveness of Private Enforcement:

(1) Detection:

There seems to be little doubt that in the jurisdictions in the study, the private sector has been found to have a superior ability to detect anticompetitive conduct having an immediate impact upon market participants. This has led to a *de facto* degree of specialization in enforcement activity, in which readily detectible offences that may be effectively remedied through the issuance of interim injunctive relief are left in the main to enforcement by the private sector. The public sector has focused increasingly upon hard-core cartel activity, in which the anticompetitive conduct is not readily detectible due to its covert nature. The more pervasive investigatory powers of the public sector, in combination with useful administrative mechanisms such as amnesty programs, have been found to be much more effective in detecting this kind of activity.

Of course, the division of labour between the public and private sectors in this area is far from complete. Large private sector corporations might not be deterred by cost considerations from investigating and attacking hard-core cartel activity in a private action. The public sector may wish to take action against readily detectible offences that are flagrant and repeated, pervasive in an industry, or provide a potential vehicle for establishing a valuable precedent.

(2) Deterrence:

It is not at all certain from the study that private actions in jurisdictions other than the United States are effective deterrents to anticompetitive conduct. With the hope of making its private action an effective deterrent, New Zealand recently proposed an amendment to the Commerce Act authorizing the award of exemplary damages to private plaintiffs even though the defendant may be liable to a pecuniary penalty in a corresponding Commerce Commission action. It seems unlikely, however, that this will achieve New Zealand's deterrence objective. The prospect of substantial exemplary damages being awarded does not seem great. To date, no court in New Zealand has even awarded compensatory damages to private plaintiffs.[495]

Moreover, the experience of Ireland with exemplary damages would appear to weigh heavily against New Zealand's chances of success in this area. It will be recalled that in 1990, Ireland attempted to stimulate enforcement through private action by authorizing the award of exemplary damages; however, few private actions were filed. Ireland was compelled in 1996 to buttress enforcement through private action by providing the public sector with wide investigative authority and the power to bring criminal prosecutions.[496]

(3) Compliance:

It appears from the study that the private sector can be an effective partner in achieving compliance with competition law if interim injunctive relief or cease and desist orders are made available to it on a relatively cheap, expedited basis. The Federal Trade Commission in the United States has had considerable success with its "cease and desist order" program. Impressed by its success, New Zealand has proposed to follow suit by empowering the Commerce Commission to issue cease and desist orders. New Zealand has even gone one step farther than the Federal Trade Commission by proposing to make the Commerce Commission's orders effective from the date of issue even if they are under appeal.[497] The Federal Trade Commission's orders are not final until the appeal process has been exhausted.[498]

The structure that both jurisdictions have adopted, however, seems inefficient. It prevents the private sector from making application for such orders in its own right. Perhaps as a filtration device or as a means of eliminating pressure to require undertakings to pay damages for orders improvidently granted, the investigatory branch of the administrative body is the only entity empowered to apply for cease and desist orders. While it seems undeniable that private parties will be stimulated to file complaints with the investigatory branch in the hopes of prompting an investigation leading to a cease and desist order, the interposition of the branch between the private complainant and the adjudicator would seem to impose a bottleneck to relief and a drain upon resources. The resulting strain upon the Commerce Commission's already limited budget may threaten to undermine the effectiveness of New Zealand's proposed program.[499]

(4) Compensation:

In all jurisdictions but the United States, private actions have not proven to be adequate vehicles for recovering compensation for antitrust injury. Few damage claims have been successful in Australia. None has been successful in New Zealand. The vast majority of private actions are for injunctive relief.[500]

It is possible that damages may have been recovered in the context of settlements of private actions; however, the settlements usually are confidential in nature and do not form part of the public record unless issued as consent orders or decrees. In the United States, almost 90% of private actions are settled or dismissed; in Australia, the data in the Brunt study indicated that settlement or dismissal occurred in about 78% of private actions.

(5) Guidance to the Business Community:

Despite their apparent shortcomings in the areas of deterrence and compensation, private actions in the United States, Australia, and New Zealand have resulted in judicial decisions that have given valuable guidance to the business community on its responsibilities under competition law. In the post-World War II period in the United States, private actions were responsible for most of the major developments in antitrust law.[501] In Australia, important contributions to the law were made in private actions. The contributions included, inter alia, developments in the law relating to market definition, predatory pricing, substantial lessening of competition, misuse of market power and concerted refusal to deal.[502] In New Zealand, virtually all of the key injunction decisions were made in private actions.[503]

Table of Contents

Notes

[1] Trade Practices Act 1974 (Cth), as amended.

[2] The Industry Codes and Consumer Protection provisions of Parts IVB & V of the Act are actively enforced by the ACCC and private parties. They do not, however, relate to the main focus of the study and are not analysed herein.

[3] As used herein, a per se offence is one which is prohibited without requiring proof of its actual or likely effect upon competition.

[4] Like the Australian Trade Practices Act, the Canadian Competition Act contains both competition and consumer protection provisions. The Australian Act, however, is much broader. It contains in addition, provisions governing unconscionable conduct; product safety; sale of goods; liability of manufacturers and importers of defective goods; industry codes; shipping conference agreements and ocean carriers; access to essential services; and, access, competition and tariffs in telecommunications.

While the competition provisions of the Australian Act and the Competition Act overlap to a considerable extent, the overlap is not complete. The Competition Act, for example, does not have any equivalent to the somewhat special secondary boycott provisions of the Australian Act. The competition provisions of the Australian Act do not have any equivalents to the refusal to deal, consignment selling and delivered pricing provisions of the Competition Act.

[5] See § 80 of the Act.

[6] The exclusion was enacted in response to perceived abuse by private parties of their ability to obtain injunctive relief against mergers. Interestingly, the private action provisions of New Zealand's Commerce Act, which were modelled upon those of Part IV of the Australian Act in 1986, have permitted private parties to obtain injunctive relief against mergers since 1990. See the chapter on New Zealand, *infra*.

[7]Maureen Brunt, The Role of Private Actions in Australian Restrictive Practices Enforcement (1990), 17 Melbourne Univ. L. Rev. 582. The study suggested that statistics regarding secondary boycott actions be excluded from assessment of the role of private actions in enforcement of competition policy. It stated, "[§45D] has always been a popular provision with employers, with interim and interlocutory injunctions often secured. The issues raised are somewhat special and ... interact with the Conciliation and Arbitration Act, so there is some point in recording figures net of the § 45D proceedings." Id., at 589-90.

[8] Id., at 589.

[9] Many of the secondary boycott actions were filed by employers seeking to enjoin trade unions from engaging in secondary picketing or other conduct harmful to the businesses of their customers or suppliers. There are no equivalent provisions in the Canadian Competition Act, and, as noted in n. 7, supra, the secondary boycott provisions of § 45D of the Australian Act are somewhat special. The private enforcement of § 45D is not regarded as part of true restrictive trade practices enforcement. For this reason, secondary boycott actions are considered to be outside the policy scope of the study.

[10] Website address: http://law.agps.gov.au/. The website contains several valuable databases, including the federal decisions database, which was used in the survey. The database is kept current to within a few days of search. At the time of the search, the database was current to January 20, 1999.

[11] The figures in the Table were obtained by searching the federal decisions database for decisions containing the expression "trade practices act" and key words for each of the above practices. In most cases, the key words were the same as the name of the practice, e.g., price fixing; however, for agreements substantially lessening competition, the key word were "substantially lessening competition." Note also that all decisions were counted, not just those that concluded particular cases. Some of the decisions listed in the Table were interlocutory in nature. For the record, secondary boycott actions accounted for 16 decisions in private actions in the period 1990 - 99.

[12] A single private action may include more than one cause of action, eg., a claim that the defendant engaged in exclusive dealing and a separate claim alleging misuse of market power.

[13]) Telephone interviews with Commissioner Bhojani, January 6 & 21, 1999.

[14] Telephone interview with Commissioner Kathryn Cronin of the ALRC, January 11-12, 1999.

[15] See § 86(4) of the Act.

[16] The Private Action: TPC Action ratio of 4:1 falls to 3:1 if § 45D secondary boycott actions are excluded from the calculation, as they should be. See nn. 7 & 9, supra.

[17] The TPC merged into the newly-created ACCC at the beginning of fiscal year 1995. The ACCC also took over the activities and staff of the Price Surveillance Authority (PSA) and, as noted in n. 4, supra, it plays a significant role in many areas beyond enforcement of competition policy.

[18] Note that merger cases were included in the statistics for the ACCC and they were not included in the

statistics for private actions. The Act has not permitted private actions for injunctive relief to be brought in merger cases since 1977. While the Federal Decisions data base found several decisions in private actions that included in their text the expressions, "Trade Practices Act" and "merger", a brief review of these decisions showed that they involved, e.g., allegations of misleading representation or unconscionable conduct, and not merger activity proscribed by § 50 of the Act. For the record, in the period under review there were four decisions from the court in secondary boycott actions brought by the ACCC or its predecessor, the TPC.

[19] See text accompanying nn. 100 - 102, infra.

[20] The ACCC has a range of administrative remedies available to it, from simple negotiation and resolution of complaints to obtaining formal undertakings under § 87B of the Act, which are enforceable in the courts. See text accompanying nn. 61 - 65, infra. Indications are that since the introduction of § 87B into the Act in 1993, the ACCC/TPC has made increasing use of this mechanism to resolve cases before they were concluded in court.

[21] The 1998 media releases indicated that the ACCC initiated three (3) actions alleging price fixing; settled one (1) previous price fixing case; initiated two (2) actions alleging agreements substantially lessening competition; and settled one (1) previous resale price maintenance case.

There also were misuse of market power and secondary boycott cases. On December 24, 1998, the ACCC initiated a misuse of market power action against the Australian telephone company, Telstra, as part of its effort to enforce competition in the previously-regulated communications sector of the economy. On July 3, 1998, it settled a misuse of market power case against a taxi company. On May 22, 1998, the ACCC initiated a secondary boycott action against maritime unions that were involved in a stevedoring dispute . This resulted in a succession of interim injunctions and, in September-October, 1998, a settlement under which the unions funded a $7.5 million trust fund to be administered by the ACCC to compensate individuals and businesses that were injured by the boycott.

The ACCC initiated an exclusive dealing action against a lawyer who was involved in tying financing packages to the sale of real estate at auction. The media releases also indicated that the ACCC was actively involved in reviewing several mergers but resolved its concerns through negotiation with the parties.

[22] Brunt, supra, n. 7, at 582.

[23] Id., at 585.

[24] Id.

[25] Id.

[26] The Australian Law Reform Commission was established by the Law Reform Commission Act 1973. Under § 6 of the statute, its mandate is to review, modernize and simplify the law. The ALRC commenced operations in 1975.

[27] ALRC Report No. 78, *Beyond the Door-keeper* Standing to Sue for Public Remedies (1996), at para. 4.40. In a footnote, the ALRC added, "Anecdotal evidence from the Commission's consultations indicates that very few applications under ... [the Trade Practices Act] are brought by people who are not directly affected by the conduct in question. This is consistent with the relatively constant number of trade practices matters commenced in the Federal Court each year (the Federal Court of Australia's annual reports since 1984-85 show that approximately 650 new applications are filed per annum) notwithstanding the growing number of groups and individuals seeking enforcement of the Act." Id., n. 60.

The ALRC also noted in the text of its report that "the law of standing does not act as an effective gatekeeper but simply adds to the issues in dispute."Id., para. 4.40. Because plaintiffs' special interests were normally intertwined with the merits of their claims, it was common for courts to reserve on objections to standing and determine them at the end of the proceedings along with the issues on the merits. See id.

[28] Id., Recommendation 2, at para. 5.25.

[29] Id., at para. 5.29.

[30] ALRC Report No. 27 (1985).

[31] ALRC Report No. 78, supra, n. 27, at para. 5.33. In this report, the ALRC also noted that "[m]ost responses to DP 61 [its discussion paper on standing] agreed with the Commission's conclusion in ALRC 27 that reforms to standing will not open the door to futile or vexatious litigation. The courts have a number of mechanisms for controlling such litigation including the power to deal with vexatious or frivolous claims and litigants, to strike out matters for showing no cause of action or for being an abuse of process, to require a plaintiff to provide security for costs and to require a lawyer to pay any costs incurred by the parties as a result of the lawyer's delay or misconduct. In some cases a court may find that a claim is not justiciable....The Commission considers that it is not a function of the law of standing to control futile litigation. This is most appropriately dealt with by the courts under their powers to manage the litigation process." Id., at paras. 4.43-.44.

[32] Since 1977, the only acquisition cases in which private parties have been permitted to obtain injunctive relief involve acquisitions outside Australia that may be challenged in the Competition Tribunal under § 50A of the Act. Before a private party may obtain an injunction, however, it must first obtain a declaration from the Tribunal that if the defendant obtained a controlling interest in a body corporate outside Australia it would substantially lessen competition and would not produce a benefit to the public within the meaning of the Act. See s§ 80(1AAA) & (1B) of the Act.

[33] See §§ 87(2) & (3) of the Act.

[34] ALRC Report No. 68, Compliance With the Trade Practices Act 1974 (1996).

[35] Id., at paras. 5.7, 5.18 & 5.21.

[36] Id., at para. 7.31.

[37] Id., at para. 5.15.

[38] Federal Court of Australia Act 1976 (Cth).

[39] ALRC Report No. 68, supra, n. 34, at para. 5.19, quoting in part § 87(1A) of the Federal Court Act.

[40] See *Tropical Shine Holdings Pty Ltd. v. Lake Gesture Pty Ltd. & Ors*, (1993) ATPR 41-283.

[41] ALRC Report No. 68, supra, n. 34, at para. 5.21.

[42] § 163A(4).

[43] Subsections 80(6) and (6A) of the Act provide:

(6) Where the Minister or the Commission makes an application to the Court for the grant of an injunction under this section, the Court shall not require the applicant or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.

(6A) Subsection (6) does not apply to an application by the Minister for an injunction relating to Part IV.

Note that s§ (6A) only prevents the Minister, and not the ACCC, from enjoying the benefit of the exemption of s§ (6) when applying for interim relief under the trade practices provisions of Part V of the Act.

[44] ALRC Report No. 68, supra, n. 34, at para. 8.10.

[45] Id. Later in its report, the ALRC did recommend that "§ 80 of the TPA be amended to make it clear that reassessment or revision of a corporation's internal compliance controls may be required as a term of injunctive relief." Id., at para. 8.11.

[46] See §§ 81 (1A) of the Act. Under s§ 81(1C), however, the court may accept instead an undertaking from the acquirer to dispose of the shares or assets under conditions that the court thinks fit.

[47]) See §§ 81(1B) and 50A(6) of the Act. Before it issued ALRC Report No. 68, supra, n. 30, the ALRC sought comment on whether divestiture orders should be available in other that the merger or acquisition context. Submissions in response almost unanimously opposed this idea, and the ALRC declined to make any recommendation on the issue. Id., at para. 8.8.

[48] The ACCC or the Minister must first have brought a prosecution under § 79 of the Act or an application for injunction under §. 80 of the Act.

[49] Under §§ 87(1B) of the Act, representative actions are restricted to contraventions of Parts IVA, IVB or V of the Act.

[50] ALRC Report No. 68, supra, n.34, at paras. 5.20, 5.21. (Emphasis in original.)

[51] Id., at para. 5.18. (Emphasis in original.)

[52] Note, however, that the proposed amendment retained the "opt-in" requirement of the former § 87(1B), which required the ACCC to obtain the written consent of the persons it was representing before filing its representative action. Id., at para. 5.17.

[53] ACCC Media Release, May 22, 1998.

[54] ACCC Media Release, September 3, 1998.

[55] ACCC Media Release, October 8, 1998.

[56] Section 78 of the Act reads, in pertinent part:

> 78. Criminal proceedings do not lie against a person by reason only that the person
>
> (a) has contravened a provision of Part IV; ...

[57] It was suggested in submissions

The remaining subsections of § 78 make it clear that those who become involved in, attempt, aid and abet, induce or conspire to contravene Part IV are likewise immune from criminal prosecution.

to the ALRC that these maximum penalties, which were established in December, 1992, were too high. The

ALRC rejected these submissions, given that the penalties must apply "to the most serious contravention of any provision of PtIV." ALRC Report No. 68, supra, n. 34, at para. 10.44. The ALRC recommended, however, that factors in addition to those specified in § 76 of the Act should be taken into account when determining an appropriate sentence, including the profit made as a result of the contravention, continuance of the contravention after notice from the ACCC, and the institution of adequate compliance controls by the defendant. Id., at para. 10.38.

[58] Id., at para. 10.35. At the moment, adverse publicity orders are only available for contraventions of Parts IVB & V of the Act. See § 80A of the Act.

[59] Id., at para. 8.14.

[60] Id.

[61] ALRC Report No. 68, supra, n. 34, at para. 11.3.

[62] Authorizations and notifications will be addressed later in this study. As to undertakings, section 87B of the Act provides, in pertinent part, as follows:

87B Enforcement of undertakings

> (1) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a matter or in relation to which the Commission has a power or function under this Act ....
>
> (3) If the Commission considers that the person who gave the undertaking has breached any of its terms, the Commission may apply to the Court for an order under subsection (4)....Under §§ 87B(4), the Federal Court may

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Author - Industry Canada - Competition Bureau Publication Date - 2000-04-03

Notes (cont'd)

[63] *Guideline on administrative resolution* TPC Canberra 1993.

[64] ALRC Report No. 68, supra, n. 34, at para. 11.5. More current information from the ACCC indicates that this number is now considerably higher. In recent years, the ACCC has tended to increase considerably its reliance upon obtaining § 87B undertakings.

[65] Id., at para. 11.9.

[66] Id., at para. 11.12.

[67] Id., at paras. 11.14 & 11.15.

[68] See text accompanying nn. 28-30, supra.

[69] See Internet at http://law.agps.gov.au/.

[70] See text accompanying nn. 53-54, supra.

[71] See text accompanying nn. 24- 25, supra.

[72] ALRC Report No. 75, Costs Shifting - Who Pays for Litigation? (1995), at paras. 4.3-4.5.

[73] See, however, ALRC Report No. 75, supra, n. 72, where the ALRC states that "[t]he risk of an adverse costs order seems to the Commission to be an inefficient mechanism for filtering frivolous, vexatious or unmeritorious claims and defences. Deterring ...[these] is more appropriately addressed by case management and other procedural controls designed to identify and deal with such claims and defences at an early stage of proceedings." Id., at para. 4.13.

[74] ALRC Inquiry Publication No. 20, The Cost of Federal Civil Litigation (1997), at para. 12.35.

[75] See Federal Court Order 62, Rule 19.

[76] Schedule 2, implemented through Order 62, Rule 12 of the Federal Court Rules.

[77] Id., Items 35 & 36.

[78] Id., Item 44.

[79] Order 62, Rule 12(1).

[80] Id., Rule 22.

[81] Id., Rule 36(1).

[82] Id., Rule 36(2).

[83] Id., Rule 36A.

[84] Order 62A, Rule 1. Under Rule 2 of this Order, however, awards of costs due to delay or misconduct by the party that is ordered to pay are recoverable in addition to the capped costs ordered by the court.

[85]ALRC Report No. 75, supra, n. 72, at n. 5 of Report.

[86] See text accompanying nn. 91-92, infra. The ALRC has, however, recommended that the ACCC be able to recover its costs of investigation. See ALRC Report No 68, supra, n. 34. To date, this recommendation has not been implemented.

[87] See text accompanying nn. 49- 50, supra.

[88] See Id.

[89] ALRC Report No. 68, supra, n. 34, at para. 11.26. (Emphasis supplied.) The ALRC went on to recommend that the ACCC be entitled to apply for declarations in its own right. Id., at para. 11.27.

[90]Interview with Commissioner Bhojani, January 21, 1999.

[91] Supra, n.7.

[92] Id., at 590. (Emphasis supplied.)

[93] See § 101A of the Act.

[94] S. Bhojani, Exemptions, Notifications and Authorisations (1996), at Internet Site www.accc. gov.au/docs/speeches/sp3of96.html.

[95] Id.

[96] See § 165 of the Act and Regulation No. 28.

[97] (1987) ATPR 40-774 (Trade Practices Tribunal).

[98]) Id., at 48,418 - 419.

[99] Interview with Commissioner Bhojani, January 21, 1999.

[100] ACCC Annual Report, 1997-98, at 9. It was indicated in the January 21, 1999, interview with Commissioner Bhojani that in restrictive trade practices cases under Part IV of the Act, the ACCC generally takes into account the following factors:

(1) The market shares of the parties;

(2) The significance of the conduct in question; and,

(3) How well resourced the potential litigants are.

[101] ACCC, A Guide to Unconscionable Conduct in Business Transactions (1998), at Internet Site http://www.accc.gov.au/docs/bus%5Fconduct.htm.

[102] See also, ACCC, Small Business Report: Small Business Amendments to the TPA (1998), Internet Site http://www.accc.gov.au/smallbus/sbr2.html, where the ACCC said:

The Commission's latest Annual Report says that it will continue to select its consumer protection priorities by having regard to key issues in its operating environment and whether or not the conduct:

- is multi-state, national or international;
- involves significant consumer detriment;
- warrants Commission involvement for a worthwhile educative or deterrent effect;
- causes detriment to small business and/or the competitive process;
- involves an opportunity to test the law in appropriate circumstance.

These priorities fairly closely track the criteria of "significance" set forth in the text, above.

[103] ALRC Report No. 68, supra, n. 34, at para. 11.17.

[104] Id., at para. 11.22.

[105] Id.

[106] Id., at para. 11.23.

[107] Id.

[108] The only assistance given to private litigants under the Act is found in § 83, which essentially provides that in a follow-on action for damages or a declaration, a prior finding of fact by a court in an action against the same person in which the person was found to have contravened, inter alia, a provision of Part IV of the Act "is prima facie evidence of that fact and the finding may be proved by production of a document under the seal of the Court from which the finding appears." Id.

[109] ALRC Background Paper 3, Judicial and Case Management (1996), at 11-13.

[110] Id., at 15.

[111] In light of the lengthy and hard-fought nature of restrictive trade practices cases, however, this expectation would appear to overly optimistic. See text accompanying nn. 124-25, infra.

[112] ALRC Background Paper 3, supra, n.109, at 14. Early Neutral Evaluation (ENE) involves an early evaluation of the chances of success should the matter proceed to trial. The evaluation is performed by a neutral with legal expertise in the subject matter of the dispute.

[113] Order 35, Rule 10(3).

[114] Id., Rule 10(2).

[115] The ALRC defines "vexatious" and "frivolous" as follows:

> Proceedings will be vexatious if the are
>
> - instituted with the intention of annoying or embarrassing the other party
> - brought for collateral purposes, and not for the purposes of having the court adjudicate on the issues to which they give rise
> - irrespective of the motive of the litigant, so obviously untenable or manifestly groundless as to be utterly hopeless.

The meaning of 'frivolous' is less clear. It is often used as an adjunct to 'vexatious'. When it has been considered the courts have interpreted it as describing cases that are obviously unsustainable or so obviously untenable that they cannot possibly succeed. The courts have been very cautious in regard to exercising their power to stay or dismiss vexatious or frivolous proceedings. ... ALRC Report No 75, Cost Shifting - Who Pays for Litigation (1995), at para. 11.25.

[116] See text accompanying n. 109, supra.

[117] It is not believed that liberalized rules regarding standing to sue open the floodgates to futile or vexatious litigation. The ALRC said:

> Most responses to DP [Discussion Paper] 61 agreed with the Commission's conclusion in ALRC 27 that reforms to standing will not open the door to futile or vexatious litigation. The courts have a number of mechanisms for controlling such litigation including the power to deal with vexatious or frivolous claims and litigants, to strike out matters for showing no cause of action or for being an abuse of process, to require a plaintiff to provide security for costs and to require a lawyer to pay any costs incurred by the parties as a result of the lawyer's delay or misconduct. In some cases a court may find that a claim is not justiciable. ... ALRC Report No. 78, Beyond the

Door-Keeper Standing to Sue for Public Remedies, at para. 4.43.

[118] ALRC Report No. 75, supra, n. 115, at para. 11.11.

[119] See ALRC Background Paper 3, supra, n. 109, at 37 - 38.

[120] D. Ipp, Reforms to the Adversarial Process in Civil Litigation - Part II (1995), 69 Australian Law Journal 790, at 797.

[121] ALRC Background Paper 3, supra, n. 109, at 37.

[122] Id.

[123] Discussion Paper 62 is available on the Commission's homepage http://www.alrc.gov.au

[124] Letter from Dr. Cronin dated 8 October, 1999.

[125] Report to the ALRC, Federal Civil Litigation Working Group (December 23, 1996).

[126] Supra, n. 7, at 582-83.

[127] (1992) ATPR 41-162.

[128] (1992) ATPR 41-165.

[129] (1996) ATPR 41-521.

[130] Commerce Act 1986, N.Z. Stat. 5. The Act replaced the Commerce Act 1975, which was modeled on the old U.K. Restrictive Trade Practices Act. It is administered by the Commerce Commission, which also administers the Fair Trading Act. The latter deals with misleading advertising, product safety standards, etc.

[131] See Rex J. Ahdar, Antitrust Policy in New Zealand: The Beginning of a New Era (1992), 9 Int. Tax & Bus. Lawyer 329, at 335.

[132] 1983 N.Z.T.S. No. 1.

[133] Adhar, supra, n. 131, at 336.

[134] Commerce Amendment Act, 1990, N.Z. Stat. 84.

[135] ISBN No. 0-478-00043-X.

[136] The papers all commenced with the title, "Review of the Penalties, Remedies and Court Processes Under the Commerce Act, 1986." The papers were then subtitled as follows: Paper 1: Overview; Paper 2: Reforming Penalties and Offences; Paper 3: Reforming Remedies; Paper 4: Improving Court Processes; Paper 5: Increasing Detection. They were released to the public in 1999 under the Official Information Act.

[137] CAB (98) M 48/15, and telephone interview with Mr. Geoff. Connor, Competition & Enterprise Branch, Ministry of Commerce.

[138] Discussion document, supra, n. 135, at 1, para. 1.1.

[139] A per se offence is one which is prohibited without requiring proof of its actual or likely effect upon competition.

[140] In the current statutory review, Cabinet agreed that "section 30 of the Commerce Act be widened beyond price fixing (which includes bid rigging) to include other hard core cartel activities (i.e. output limitation agreements, and market allocation agreements)." Cabinet Document CAB (98) M 48/15, at 2, para. e. See also, Commerce Act Amendment Bill, § 3.

[141] See Ahdar, supra, n. 131, at 336.

[142] See §§ 81 & 82 of the Act.

[143] See Act, § 84A, and Commerce Amendment Act, 1990, § 31.

[144] See Act, § 84.

[145] Supra, n. 135.

[146] Id., at 42, and Appendix 4, at 57. In several cases, allegations of abuse of dominance in contravention of § 36 were joined with allegations of anti-competitive arrangements or agreements in contravention of § 27 of the Act.

[147] See, e.g., Bond & Bond, Ltd. v. Fisher & Paykel, Ltd., [1986] 6 N.Z.A.R. 278 (exclusive dealing); McDonald Motors v. Christchurch International Airport (1991) 4T.C.L.R. 407 (exclusive dealing); Union Shipping New Zealand Ltd. v. Port Nelson Ltd. (1990), 3 N.Z.B.L.C .101, 618 (tying arrangement); and, Stevedoring Services (Nelson) v. Port Nelson, [1992] N.Z.A.R. 5 (tying arrangements and refusal of access to facilities).

[148] See, e.g.,; Chatham Islands Fishermen's Co-op v. Chatham Islands Packaging Co., (1988) 2 T.C.L.R. 605; Apple Fields, Ltd. v. New Zealand Apple and Pear Marketing Board, [1991] 1 N.Z.L.R. 257; Clear Communications v. Telecom Corp. (1991), Unreported CP 590/901; Clear Communications v. Telecom Corp. (1992), 4 T.C.L.R. 639; Clear Communications v. Telecom Corp. (1993), 4 N.Z.B.L.C. 103, 340 (C.A.); and, Stevedoring Services (Nelson) v. Port Nelson, supra, n.8.

[149] See New Zealand Magic Millions, Ltd. v. Wrightson Bloodstock, Ltd., [1990] 1 N.Z.L.R. 731; and, Tru Tone, Ltd. v. Festival Records Retail Mktg., Ltd., [1988] 2 N.Z.L.R. 352.

[150] See Direct Holdings v. Feltex (1986), 2 T.C.L.R. 61.

[151] See the chapter on Australia, at 4-5.

[152] Supra, n. 135.

[153] Id., at 17, n. 43.

[154] Ahdar, supra, n. 131, at 335.

[155] Id., at 331-34.

[156] But see, § 89(2) of the Act, which provides that in any action on a contract or covenant in which a contravention is found, which includes an action for injunctive relief, the court may, on its own initiative, vary or cancel the contract or covenant, and require a party to the contract or covenant to make restitution or pay compensation to another party.

[157] See also, § 89(1) of the Act, which empowers the court to order, inter alia, the payment of damages in an action for an injunction. Before making such an order, however, the court must find "that a person who is a party to the proceedings has suffered, or is likely to suffer loss or damage by conduct ... in contravention of any of the provisions of Part II of this Act."

[158] See Union Shipping New Zealand Ltd. v. Port Nelson Ltd., supra, n. 147; and, Clear v. Telecom (1992), supra, n. 148.

[159] See discussion document, supra, n. 135, at 24.

[160] Supra, n. 135.

[161] [1975] A.C. 396, at 405-06.

[162] Discussion document, supra, n. 135, at 30.

[163] Id., at 43-44.

[164] Id., at 40.

[165] See also, id., at 43 - 44.

[166] Id., at 41.

[167] Paper 3: Reforming Remedies, supra, n. 136, at 5, paras. 28-29.

[168] Id., at 5, para. 31.

[169] Cabinet document CAB (98) M 48/15, at 3, para. 3e, and § 10 of the Commerce Act Amendment Bill.

[170] Paper 4: Improving Court Processes, supra, n. 136, at 1.

[171] For more on cease and desist orders, see section 3(b)(2) of this chapter, infra.

([172] Discussion document, supra, n. 135, at 45.

[173] Id.

[174] Id., at 46.

[175] See the discussion document, supra, n. 135, at 34, § 4.3.2.

[176] Id.

[177] Id., § 4.1.

[178] Note, however, that the committee agreed with the discussion document that deterrence should be the primary goal of the enforcement regime of the Act. The committee said:

> Having deterrence as the prime objective of the regime is the key in achieving an effective enforcement regime. In the area of competition sanctions do not need to protect society from continued violations to the extent required for violent crime. Also, Commerce Act offenders are not generally in need of rehabilitation. Rather the need is for the Act's sanctions to punish today's offender with sufficient severity to discourage others from committing similar acts in the future. .... Paper
>
> 1, supra, n. 136, at 5, para. 24.

[179] Paper 3, supra, n. 136, at para. 21

[180] Cabinet document CAB (98) M 48/15, at 3, para. 3c, and § 9 of the Commerce Act Amendment Bill.

[181] Discussion document, supra, n. 135, at 32, n. 96, and at 50.

[182] Supra, n. 147.

[183] Supra, n. 148. The decision of the Court of Appeal was later reversed by the Privy Council.

[184] Discussion document, supra, n. 135, at 41, para. 5.3.

[185] (CL 5/94, Auckland, 3 February 1997) at 197.

[186] Discussion document, supra, n. 135, at 42, para. 5.3.

[187] Paper 4, supra, n. 136, at 5, paras. 27-28.

[188] Id., at 4, para. 23.

[189] Id., at 5-6, paras. 28 & 32.

[190] Id., para. 29.

[191] Id., para. 31.

[192] Id., para. 33.

[193] Cabinet document CAB (98) M 48/15, at 3, paras. 4b-f.

[194] Paper 4, supra, n. 136, para. 31.

[195] Id., at 3, para. 15. Cease and desist orders would not be available in merger cases.

[196] Id., para. 18.

[197] Id., para. 17. This vision was essentially reproduced in §§ 5A & 10A of the Supplementary Order Paper filed on July 29, 1999. There were, however, some additional features. Section 5A empowered the Commission to require positive action in a cease and desist order if satisfied that "restraining ...the conduct will not restore competition, or the potential for competition." It also provided for the imposition of pecuniary penalties for contraventions of cease and desist orders.

[198] Id., at 4, para. 23.

[199] Id., para. 21.

[200] Id.

[201] Id., at 4-5, para 24.

[202] Id., at 5, para. 26.

[203] See n. 194 and accompanying text, supra, as well as the Supplementary Order Paper, July 29, 1999.

[204] Commerce Act, § 75. The Cabinet Economic Committee considered and rejected the criminalization of contraventions of the Act. Paper 2, Reforming Penalties and Offences, supra, n. 136, at 6-7, paras. 26-32.

[205] Commerce Act, §§ 80(1)(f) & 83(1)(f).

[206] Paper 2, supra, n. 136, at 1, para. 4.

[207]) Most of the pecuniary penalties imposed since 1990 were presented to the court as agreed penalties. They were negotiated between the Commission and the defendants. The discussion document said that this might have contributed to a conservative approach toward the subject of penalties because the Commission generally requested penalties at the lower end of the scale to encourage avoiding the full cost and time delays of a contested trial. Discussion document, supra, n. 135, at 22.

[208] Paper 2, supra, n. 136, at 2, para. 6.

[209] Cabinet document CAB (98) M 48/15, at 2, para. 2c.

[210] Paper 2, supra, n. 136, at 4., para. 16.

[211] Id., at 7, para. 37.

[212] Id., at 10.

[213] Cabinet document CAB (98) M 48/15, at 3, paras. 2i & j, and Commerce Act Amendment Bill, §§ 6 & 7.

[214] Id., at 3, para. k.

[215] Paper 2, supra, n. 136, at 8, para. 42.

[216] Id.

[217] Id.

[218] Id., at 10.

[219] See Part V and § 61(6) of the Act.

[220] See § 66 of the Act.

[221] See § 69A of the Act.

[222] Paper 4, supra, n. 136, at 5, para. 25.

[223] Paper 5: Increasing Detection, supra, n. 136, at 3, paras. 15-16.

[224] Cabinet document CAB (98) M 48/15, at 4, para. 5g.

[225] Discussion document, supra, n. 135, at 51.

[226] Id.

[227] Paper 4, supra, n. 136, at 3, para. 12.

[228] Written response to research assistant from the Commerce Commission, November, 1998.

[229] Unreported, CP 849/90, February 5, 1993.

[230] (1995), 5 N.Z.B.L.C. 103,668.

[231] See discussion document, supra, n. 135, at 22.

[232] Paper 1, supra, n. 136, at 12.

[233] Id. The Commission, however, has taken informal steps to recover costs beyond those formally granted by a court. In 1997, the Commission noted that in its case against Port Nelson Ltd. (PNL), infra, n. 239, "[i]n addition to the $500,000 penalty imposed by the court, PNL agreed to pay $325,000 as a contribution to the Commission's costs for taking the action. This was in addition to the $25,000 costs ordered by the Court of Appeal." 44 Commerce Commission Newsletter, Fair's Fair , at 2 (Feb./March, 1997).

[234] Id.

[235] Written response from the Commerce Commission, supra, n. 229.

[236] Id.

[237] Paper 1, supra, n. 136, at 12.

[238] (1995), 2 N.Z.B.L.C. 103,480.

[239] [1992] N.Z.A.R. 5. After completion of the Commerce Commission's action, the private plaintiffs followed-on with an action for damages. The action was settled on undisclosed terms.

[240] The power to authorize resale price maintenance was added in the 1990 amendments.

[241] See §§ 58 & 61(6)(d) of the Act. Under § 3A of the Act, which was inserted into the statute in the 1990 amendments, the Commission is required to have regard to any efficiencies that likely would result when evaluating public benefit.

[242] Nevertheless, it appears that price fixing agreements may be authorized under the more general provisions of §§ 27 and 28 of the Act. See R. J. Adhar, Antitrust Policy in New Zealand, supra, n. 131, at 371, where the author states, "Most anti-competitive conduct can be authorized, including horizontal price fixing, group boycotts, and, after 1990, resale price maintenance. A notable exception, however, is misuse of dominant position."

[243] See § 67 of the Act.

[244] Id., §§ 67(1)(b).

[245] Id., §§ 67(1)(a).

[246] Cabinet document CAB (98) M 48-15, at 4, para. 5h.

[247] [1986] 6 N.Z.A.R. 278 (High Ct.).

[248] [1989] 2 N.Z.B.L.C. 104,393.

[249] [1990] 2 N.Z.L.R. 731 (High Ct.). This decision by the High Court also decided a private action by Fisher & Paykel's competitors in which they sought a declaration that the latter's practice of exclusive dealing contravened the Act.

[250] See § 75 of the Act.

[251] Id., § 77.

[252] Id., §§ 77(9)-(11).

[253] Id, § 97.

[254] Written response from the Commerce Commission, supra, n. 229.

[255] Discussion document, supra, n. 135, at 1, para. 1.1.

[256] See Section 3(b)(2) of this chapter, supra.

[257] On this point, the Cabinet Economic Committee said, "empowering the Commission to issue cease and desist orders will create a greater degree of transparency in the processes and procedures of the Commission. This increased transparency will enhance the perception of the Commission among the business community and is likely to improve compliance as a result." Paper 4, supra, n. 136, at 5, para. 25.

[258] The Committee said:

Many cases are characterised by a significant number of interlocutory proceedings, drawn out substantive hearings and one or two appeals. This is particularly the case for actions taken by participants in network industry markets. The high probability that any significant case will be drawn out, implies a low probability that cases will be commenced. .... Paper 4, supra, n. 136, at 1.

[259] Id., at 3, paras. 11-12.

[260] This estimate was based upon a review of all historical cases, most of which would have been private actions. Paper 4, supra, n. 136, at 1.

[261] Id.

[262] Id., at 2.

[263] (CL 5/94, Auckland, February 3, 1997) at 197.

[264] Id. See also, discussion document, supra, n. 135, at 48, para. 6.2.1.

[265] Discussion document, supra, n. 135, at 42, para. 5.4.

[266] (1993) 4 N.Z.B.L.C. 103,340 (C.A.) The decision, however, was subsequently overturned by the Privy Council. See discussion document, supra, n. 135, at 44, para. 5.4.1.

[267] Paper 5, supra, n. 136, at 2, para. 6.

[268] Paper 3, supra, n. 136, at 1.

[269]) Id.

[270] Discussion document, supra, n. 135, at 3, para. 1.3. The document states, "In order to achieve deterrence, the costs to firms of contravening a competition law must be at least 100% of the illegal gain and much greater in relation to some offences such as price fixing."Id.

[271] 1998 Chapter 41.

[272] Section 1 of the Act states that it replaces the Restrictive Practices Court Act 1976 (c. 33); Restrictive Trade Practices Act 1976 (c. 34); Resale Prices Act 1976 (c. 53); and, Restrictive Trade Practices Act 1977 (c. 19). Generally, mergers are excluded from the prohibitions of the Act. They remain subject to § 65 of the 1973 Act, as amended by Schedule I of the Competition Act. Mergers that are subject to EC controls are also excluded under Schedule I.

[273] There was a private right of action under the former restrictive trade practices legislation but it did not result in any reported cases.

[274] See § 60 of the Act, which provides that for purposes of interpretation and application of governing principles, questions arising under the Act should be "dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community."

[275] The prohibitions of section 2 of the Act mirror those in article 85 of the Treaty. They prohibit, inter alia, agreements to fix prices; restrict production, technical development or investment; share markets or sources of supply; discriminate between traders; or tie together unconnected obligations. These are called Chapter I prohibitions.

The prohibitions of section 18 of the Act mirror those in article 86 of the Treaty. They prohibit abuse of dominant position by, inter alia, imposing unfair trading conditions; limiting production, markets or technical development; discriminating between traders; or tying together unconnected obligations. These are called Chapter II prohibitions.

[276] See Christopher Blair, Research Paper 98/53 -- Competition Bill [H.L.] Bill 140 of 1997-98 (House of Commons - Business and Transport Section: London, April, 1998), at 41-2.

[277] Restitution is a form of equitable relief designed to place the injured party in the same position it would have been in if, e.g., an illegal agreement had never taken place. It takes the injured party back to its original position. Damages are forward-looking. They seek to place the injured party in the same position it would have been in if the agreement in question was carried out in a lawful manner. Generally, restitution will only be granted where damages will not suffice to compensate for the injury.

[278] Agreements that contravene the prohibitions of the Treaty are considered illegal and void. They are unenforceable by the courts. If one party to such an agreement seeks to enforce it against the other, the latter may seek a court order declaring that it is unenforceable due to its illegality. This would be akin to injunctive relief.

[279] [1991] E.C.R. I-935.

[280] Id., at I-982.

[281] *Garden Cottages Foods Ltd. v. Milk Board*, [1984] A.C. 130 (H. of L.).

[282] *Gibbs Mew Plc v. Gemmell (Graham)* (22/7/98), Case No. FC3 98/5827/1 et seq. (C.A.). (Retrieved from website www.smithbernal.com/casebase_search_frame.htm.) The court stated that English law does not allow a party to an illegal agreement to claim damages resulting from the agreement and, as a result, the sole remedy available to a party to the agreement would be a decree of unenforceability due to illegality. The court cited with approval two authorities from the European Community which stated that third party competitors were those who were intended to be protected by provisions like article 85 of the Treaty and it was they who could recover damages for losses suffered as a result of its infringement. See *Italy v. EEC Council*, [1966] E.C.R. 389, at 406; and, Opinion of Adv. Gen. Van Gervan in *H.J. Banks & Co. Ltd v. British Coal Corp.*, [1994] E.C.R. I-1209, at I-1250, para 44.

[283] See n. 282, supra.

[284] See n. 283, supra.

[285]) See §§ 12 - 16 & 20 - 24 of the Act.

[286] The Director cannot grant block exemptions on his or her own initiative. The Secretary of State has the authority to grant them upon recommendation from the Director.

[287] See §§ 4 - 10 of the Act.

[288] See § 35 of the Act.

[289] See § 34 of the Act.

[290] See § 36 of the Act.

[291] Id.

[292] Lord Woolf's Report is available at the following internet website: http://www.law.warwick.ac.uk/woolf/report/

[293] Id., at Overview, para. 8.

[294] Id., at paras. 9-10.

[295] Forward to the new Civil Procedure Rules, Practice Directions and Forms, published at the following internet website: www.courtservice.gov.uk.

[296] Mergers were excluded from the Act. They remained reviewable by the Minister for Enterprise, Trade and Employment under the Mergers and Take-over (Control) Acts, 1978 - 1996. In a 1996 amendment to the Act it became theoretically possible for the Competition Authority to review mergers; however, it has not done so. V. Power, *Lessons from Recent Irish Merger Cases*, at Internet Site http://www.clubi.ie/competition/compframesite/index.htm. On July 8, 1997, the Competition Authority called for changes to the Mergers Act to increase transparency and effectiveness while addressing competition concerns. New legislation is under consideration. In 1998, the Merger Review Group issued a draft report in the matter.

[297] The anti-competitive conduct prohibited by § 4 of the Act includes price fixing; limitation of production, markets, technical development or investment; market division; price discrimination; and, tied selling.

[298] Under the prohibition of § 5 of the Act, abuse of dominant position includes unfair pricing; limitation of production, markets or technical development to the prejudice of consumers; price discrimination; and, tied selling.

[299] Like its counterparts in Australia, New Zealand and the UK, the Irish Competition Authority has the power to exempt anti-competitive agreements, etc., from the prohibitions of the Act. For more on this, see text accompanying nn. 311-12, infra.

[300] Department of Justice, Equality and Law Reform, Irish Judicial System, at 12 (May, 1998).

[301] See id., at 12. The pecuniary limit for tort actions in the Circuit Court is L30,000.

[302] Interview with Mr. Patrick Massey, Director of Enforcement, Competition Authority, November 4, 1998.

[303] Competition Authority Guide, Competition Law and Small Business (1997), Internet Site http://www.irlgov.ie/compauth/broc2.htm, at 3-4.

[304] The Competition Authority was empowered to prosecute offences in summary proceedings, which limit potential fines to a maximum of L1,500 and imprisonment to a maximum of six months. When the Authority wishes to prosecute a more serious offence by way of indictment, the offence must be referred to the Director of Criminal Prosecutions.

[305] See Competition Authority Guide, supra, n. 304, at 3, where the Competition Authority stated:

The Competition Acts operate alongside the EU competition rules. Articles 85 and 86 of the Treaty of Rome contain prohibitions on anti-competitive arrangements between firms and on abuse of dominant position similar to those contained in Sections 4 and 5 of the Competition Act, where such behaviour has an effect on inter-state trade. The EU Commission may impose fines of up to 10% of world-wide turnover for breaches of these rules.

[306] Introductory note by the Editors of the Competition Journal to: Enforcement Guidelines & Criminal Prosecution for Anti-Competitive Offences (1998), Internet Site http://www.clubi.ie/competition/compframesite/Criminal.html, at 1.

[307] As reported in 7 Competition, Section A: News & Comment, at A.1 (September, 1998).

[308] See text accompanying n. 307, supra.

[309] See text accompanying n. 303, supra.

[310] See §§ 4(2)&(3) of the Act. In determining whether to issue a license, the Authority must determine that the conduct "contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit,"id., at § 4(2), and does not impose upon the parties any unnecessary restrictions while preserving competition in a substantial part of the market. As in Australia, Ireland did not grant the Competition Authority the power to grant licenses immunizing conduct contravening the § 5 prohibition against abuse of dominant position.

[311] See §§ 4(4) and §§ 6(6) of the Act. See also, §§ 6(7) of the Act, which postpones the filing of private actions until the Authority has had an opportunity to rule on an application for a license or certificate and the completion of an appeal, if any, to the High Court. Subsection 6(7) also denies private plaintiffs relief for the period in which an application remains before the Authority and/or on appeal.

[312] A copy of these guidelines may be found at the following Internet Site: http://www.clubi.ie/competition/compframesite/Criminal.html.

[313] Id., at 2 - 5.

[314] Professor Patrick McNutt, *Some Reflections on Irish Competition Policy - (Signalling Games and Credible Threats)*, Paper delivered to a Competition Press Seminar in Dublin, Ireland, February 24, 1997, at 4-5, Internet Site http://www.irlgov.ie/compauth/reflect.htm.

[315] See Address by the Minister for Justice Mrs. Nora Owen, T.D. at the launch of the District Court Rules, 1997 in the Four Courts on 7 March, 1997, at Internet Site http://www.irlgov.ie/justice/Speeches/Speeches-97/sp- 1203.htm. See also, Press

Release, Publication of the Sixth Report of the Working Group on a Courts Commission, April 21, 1999, at Internet Site http://www.irlgov.ie/justice/Press%20Releases/Press-99/pr-2204a.htm.

[316] Address by the Minister for Justice, id., at 2.

[317]The Clayton Act is codified as 15 U.S.C.A.§§ 12-27.

[318] Id., § 15

[319]Individual states may also sue for treble damages under §4 of the Clayton Act, either in their own right or as *parens patriae* on behalf of their citizens. Local governments as well as federal and state-created bodies may do the same. The United States may only sue for single damages (§ 4A.) The same limitation is applied to actions under §4 by foreign governments (§ 4B).

[320]Federal Trade Commission Act 12 U.S.C.A. §§ 31-53

[321] Clayton Act, supra, n. 1, at § 12 (a)

[322] See: Steven C. Salop & Lawerence J. White, Treble Damages Reform: Implications of the Georgetown Project, 55 Antitrust Law Journal 73 (1986).

[323] Id., at 74.

[325] Note that the numbers in the table often add up to more than 100%. This results from counting more than once individual actions containing multiple allegations.

[326] Salop & White, supra, n. 323, at 76.

[327]) Id., at 77.

[328]) Broad Definition: Includes as settlements the dismissal of cases by the courts.

[329] Narrow Definition: Treats dismissals as judgments for defendants.

[330] Salop & White, supra n. 323, at 77.

[331] Id.

[332] Broad Definition: Includes dismissals in settlements.

[333] Narrow Definition: Includes dismissals in judgments for defendants.

[334] Salop & White, supra n. 323, at 76-77.

[335] Garry D. Watson, Civil Litigation, Cases and Materials, (Emond Montgomery: Toronto,

1991), at II.

[336] Source: NAFTA Working Group, Private Actions for Violations of Antitrust Laws, Appendix A.

[337] 15 U.S.C.A., § 15.

[338] See: Atlantic Richfield Co. v. USA Petroleum Co., 495U.S. 328, 334 (1990); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 112-13 (1986); Associated General Contractors of California, Inc. v. California State Council of Carpenters (AGCC), 469 U.S. 519, 537 (1983); Blue Shield of Va. v. McCready, 457 U.S. 465, 477-78 (1982); Brunswick Corp v. Pueblo Bowl-O-Mat, Inc. 429 U. S. 477, 489 (1977)

[339] Blue Shield of Va. v. McCready, U.S. 465, 477 (1982) [citing Illinois Brick Co. v. Illinois, 431 U.S. 720, 760 (1977) Brennan, J. dissenting)].

[340] Id.

[341] C. Douglas Floyd, Antitrust Victims Without Antitrust Remedies: The Narrowing of Standing in Private Antitrust Actions, 82 Minn. Law Rev. 1 at 71.

[342] Supra, n. 338.

[343] Floyd, supra, n. 341, at 8.

[344] Id.

[345] Id.

[346] Id.

[347] Id.

[348] See n. 338, supra, and Hanover Shoe v. United Show Machinery, 392 U.S. 481.

[349] Riss & Co. v. Association of American Railroad, 190 F. Supp. 10 (D.D.C. 1960).

[350] See Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931).

[351] 15 U.S.C.A. §26.

[352] Id.

[353] See, e.g., Revere Camera Co. v. Eastman Kodak Co., 81 F. Supp. 325, 331 (N.D Ill. 1948).

[354] 7 F.R.Civ. P. 23.

[355] Rule 23 (b) (1) (A).

[356] Rule 23 (b) (1) (B).

[357] Rule 23 (b) (2).

[358] Rule 23 (b) (3).

[359] Sherman Act, 15 U.S.C.A. § 1-7. Section 14 of the Clayton Act and Section 3 of the Robinson-Patman Act are also criminal provisions.

[360] U.S.D.O.J., Antitrust Enforcement and the Consumer, Internet web site http://www.usdoj.gov/atr/public/div_stats/1638.htm, at § 2. See also, Sherman Act, §1.

[361] Sherman Act, § 5.

[362] Antitrust Enforcement, supra, n. 360, at § 2.

[363] Id., at § 5.

[364] Id.

[365] Id.

[366] Joel I. Klein, The Importance of Antitrust Enforcement in the New Economy: Address to the New York State Bar Association, Antitrust Law Section (Jan. 29, 1998), at Internet web site http://www.usdaj.gov/atr/public/speeches/1338.htm.

[367] Id., at 2.

[368] See also, n. 320, supra.

[369]Hartford-Empire Co. v. United States, 323 U.S. 386, at 441-442 (1945). Note that under § 15, the court may make any temporary restraining order or prohibition as is deemed just. Section 15 does not require the United States to provide security or bond against damages for an improvidently granted order, as does § 16 of the Clayton Act, relating to private actions.

[370]For the significantly narrower scope of private actions for injunctions, see text accompanying n. 353, supra.

[371] Anne K. Bingaman, Change and Continuity in Antitrust Enforcement; Address to the Fordham Corporate Law Institute, Fordham Law School (October 21, 1993), at 4.

[372] Id.

[373] Section 5(a) of the Clayton Act also provides that "judgments or decrees entered into" in actions by the United States for its own actual damages may not be used as prima facie evidence in subsequent private actions. Note too that § 5(a) also provides for the issuance of consent decrees in criminal actions. These, however, may be used as prima facie evidence in subsequent proceedings.

[374] See 18 U.S.C.A. §401.

[375] The Antitrust Division checks compliance by issuing Civil Investigative Demands under the Antitrust Civil Process Act, 15 U.S.C.A. §§1311-14, 18 U.S.C.A. §1505. By means of these demands, the Division can compel a company to produce its books and records for inspection. More broadly, Civil Investigative Demands may be issued against any person, not a natural person, who is under investigation and reasonably believed to possess documents relevant to a civil or criminal investigation. See Id., §1312(a).

[376] See FTC v. Cement Institute, 333 U.S. 683, 689-95 (1948). The FTC was established in 1914 at the same time as the Clayton Act was passed. See, Federal Trade Commission Act, 38 Stat. 717 (1914).

[377]The FTC has the responsibility to prevent unfair methods of competition that violate the Sherman Act, and the discrimination, tying, exclusive dealing, and merger provisions of the Clayton Act. Other matters falling under the jurisdiction of the FTC include false and deceptive advertising and unfair methods of competition in export trade. The FTC also has certain investigatory and information-gathering powers regarding economic and business conditions.

[378]II The Public Papers of Woodrow Wilson - - College and State 432 (auth'd ed. 1925).

[379] See §5(b) of the FTC Act for the power of the FTC to issue cease and desist orders.

[380] See 16 C.F.R. §§0.14; 2.1 & 2.2.

[381] In 1996, the Commission established an optional "fast track" procedure for Commission adjudicatory proceedings challenging conduct that had already been preliminarily enjoined in Federal court. See text accompanying nn. 67 et seq., infra. In 1998, the Commission broadened the "fast track" option to include matters in which significant discovery had already occurred in a federal court proceeding. See Federal Register: February 13, 1998 (Volume 63, Number 30), at Internet site http://www.ftc.gov/os/1998/9802/fasttrack.htm. The "fast-track" option rules may be found at 16 C.F.R. §3.11A.

[382] See § 5(c) of the FTC Act.

[383] Id., § 5(e).

[384] Id., § 5(g).

[385] Id., § 5(l).

[386] Id.

[387] Id. § 13(b).

[388] Id.

[389] Id. If the Commission succeeds at trial, a permanent injunction will ensue.

[390] Anne K. Bingaman, supra, n. 371, at 9. Se also Gary R. Spatling, Making Companies an Offer The Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy - - An Update, Address to the District of Columbia Bar Association, Washington, D.C., February 16, 1999.

[391] Id., at 8-9.

[392] Id., at 2-3

[393] See Internet site http://www.usdoj.gov/atr/public/guidelines/lenind.htm.

[394] See 26 C.F.R § 50. 6.

[395] Annual Report of the Federal Trade Commission for Fiscal Year Ended September 30, 1997, at Appendix.

[396] See Judith A. Moreland, Attorney, Bureau of Competition FTC, Overview of the Advisory Opinion Process at the Federal Trade Commission, address to the National Health Care Lawyers Association, Washington, D.C., February 13, & 14,

[397] Id.

[398] See Moog Industries, Inc. v. FTC, 355 U.S. 411 (1958).

[399] See Annual Report of the FTC, 1997, supra, n. 395, at Appendix.

[400] Id.

[401] Antitrust Division Manual, Chapter VII, page 1, at Internet site http://www.usdoj.gov/atr/foia/divisionmanual/ch.7.htm. The two agencies also share responsibility for administrating the Hart-Scott-Rodino Act, which initiated pre-merger notification in the United States. They have jointly issued Pre-Merger Notification Guidelines.

[402] Id., at 1-2.

[403]See William J. Baer, Director, Bureau of Competition, FTC, Report from the Bureau of Competition (1999), address to the American Bar association Antitrust Section, April 15, 1999; Annual Report of the FTC, 1997 supra, n. 395.

[404] See Antitrust Enforcement and the Consumer, supra, n. 360, at s. 5; and Joel J. Klein, supra, n. 366 , at 2.

[405] See Salop & White, supra, n. 323.

[406] H. First, Antitrust Enforcement in Japan, 64 Antitrust L. J. 137, at 179-80 (1995).

[407] Kronstein, Miller & Dommer, Major American Antitrust Laws, Ocean Publications, Inc., Dobbs Ferry (1965).

[408] See A. Hirsch and D. Sheehey, Awarding Attorneys' Fees and Managing Fee Litigation, Federal Judicial Center (1994), at Internet site http://www.fjc.gov/ATTORFEES/attyfees.html.

[409] Id., at 1.

[410] Id., at 2.

[411] See Alyeska Pipeline Services Co. v. Wilderness Society, 421 U.S. 240 (1975).

[412] See Hirsch and Sheehey, supra, n. 408, at 1-2.

[413] Id.

[414] See §§4A and 15 of the Clayton Act. § 4A authorizes an award of costs to the United States in its suits for single damages for injury to the property, etc., of the United States; however, costs are interpreted as applying only to statutory costs, such as filing fees, which are minimal in nature. They do not include attorney's fees.

[415] Advice from the Justice Department, Antitrust Division. Individual states have, however, brought *parens patriae* actions on behalf of their citizens. See n. 320, supra.

[416] See F.R.A.P. §§ 29(a).

[417] Advice from the Justice Department, Antitrust Division, Appellate Section.

[418]) Id.

[419] Three statutes purport to grant limited immunity. The Webb Pomerene Act grants limited immunity for export activity. The Newspaper Preservation Act permits certain newspapers to pool their operations so long as they maintain separate editorial policies. The National Cooperative Research and Production Act purports to confer immunity from treble damage liability, but only if it has been determined that the cooperation does not constitute an antitrust violation.

[420]See text accompanying nn. 363-367, supra.

[421] See text accompanying nn. 371-372, supra.

[422] Advice from the Justice Department, Antitrust Division.

[423] Id. See also, n. 375, supra.

[424] Id.

[425] Thomas Kauper and Edward Snyder, An Inquiry into the Efficiency of Private Anti-trust Enforcement: Follow-on and Independently Initiated Cases Compared, 74 Georgetown L.J. 1163 (1986).

[426] 28 U.S.C.A. § 471 *et seq.*

[427] Id.

[428] For an excellent review of the efficiency of voluntary arbitration in the courts, see Federal Judicial Center, Voluntary Arbitration in Eight Federal District Courts: An Evaluation (1994). For a broader perspective on the principal ADR processes used in the federal courts, see D. Steinstra, ADR in the Federal Judicial Center, Internet site www.fjc.gov/altdiress/fjcdirno7/steinso.1.html.

[429] The Civil Justice Reform Act of 1990, Final Report, at Internet site www.uscourts.gov.

[430] Federal Judicial Center, Discovery and Disclosure Practice, Problems and Proposals for Change (1997) at Internet site www.fjc.gov/Discovery/discovery/DiscSumm.html.

[431] Id., at 2.

[432] Id. The study added, "Total cost is also associated with the size of the law firm, the type of case, and whether the case was complex or contentious." Id.

[433] See F.R. Civ. P., Rule 26(a)(1).

[434] See John E. Shapard et al, Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure, Federal Judicial Center (1995).

[435] See John e. Shapard, Likely Consequences of Amendments to Rule 68, Federal Rules of Civil Procedure, Federal Judicial Center (1995).

[436] See text accompanying n. 336, supra.

[437] See text accompanying nn. 328-329, supra.

[438] See text accompanying nn. 323-335, supra.

[439] See text accompanying n. 406, supra.

[440]) See, e.g., New Zealand, text accompanying nn. 188-189.

[441] For Australia, see text accompanying nn. 27-31, supra; for New Zealand, see text accompanying nn. 159-161.

[442] See New Zealand, text accompanying nn. 162-170, supra.

[443] See Ireland, text accompanying nn. 303-307, supra.

[444] See id., text accompanying nn. 298-300.

[445] See United States, text accompanying n. 353, supra.

[446] William J. Baer, Report from the Bureau of Competition (1999), Address to the American Bar Association, Antitrust Section, Washington, D.C., April 15, 1999.

[447] See United Kingdom, text accompanying nn. 274 & 289-90, supra.

[448]) See, e.g., Australia, text accompanying n. 103, supra.

[449] In the United States, it was found that discovery expenses generally represented 50% of litigation expenses. See text accompanying n. 431, supra.

[450] See New Zealand, text accompanying n. 255, supra.

[451] See Australia, text accompanying nn. 103-108, supra.

[452] See Ireland, text accompanying n. 315, supra.

[453] See United States, text accompanying n. 422, supra.

[454] See Australia, n. 108, supra.

[455] In some cases, the scope of the private right of action is narrower that of the public sector. For example, in Australia, a private party cannot sue for injunctive relief in merger cases.

[456] See Australia, text accompanying n. 57, supra.

[457] See United Kingdom, text accompanying nn. 291-292, supra.

[458] See New Zealand, text accompanying nn. 205-211, supra.

[459] It will be recalled that in New Zealand, the Cabinet Economic Committee chose the option of exemplary damages over treble damages due to concern about the potential windfall gain to private plaintiffs that might result from the latter.

[460] See Australia, text accompanying n. 35, supra, et seq.

[461] See id, text accompanying n. 33; New Zealand, text accompanying nn. 185-186.

[462] See, e.g., New Zealand, text accompanying nn. 196-204, supra.

[463] In Australia, injunction is by far the preferred remedy. See Australia, text accompanying n. 25, supra. In, New Zealand, injunctions are virtually the only remedies that have been granted in private actions. See text accompanying nn. 176-177.

[464] New Zealand, Cabinet Economic Committee, Paper 5: Increasing Detection, supra, n. 136, at 2, para. 6. The potential for effective response by market participants to readily detectible conduct was regarded by the Cabinet Economic Committee as a necessary corollary to public enforcement. See New Zealand, text accompanying n. 269, supra.

[465] See Australia, text accompanying nn. 17-18, supra. See also, text accompanying nn. 19-21, which indicates that price fixing and conspiracy remain a leading concern of the Australian Competition and Consumer Commission. The priorities which are observed in practice do not correspond with the Commission's stated priorities, which were said to be abuse of market power and resale price maintenance. See text accompanying n. 101, supra.

[466] Until now, only price fixing and bid rigging were per se offences.

[467] See New Zealand, text accompanying nn. 139 - 139, supra, and Cabinet Economic Committee, Paper 5, supra, n. 23.

[468]) See Australia, text accompanying nn. 100-102, supra; New Zealand, text following that accompanying n. 254, supra; Ireland, text accompanying nn. 313-314, supra.

[469] See U. S. Department of Justice, Antitrust Enforcement and the Consumer, at Internet site www.usdoj.gov/atr/public/div_stats/1638.htm; Joel I. Klein, The Importance of Antitrust Enforcement in the New Economy, Address to the New York State Bar Association, Antitrust Law Section, January 29, 1998.

[470] Anne K. Bingaman, Change and Continuity in Antitrust Enforcement, Address to the Fordham Corporate Law Institute, October 21, 1993.

[471] See Australia, text accompanying n. 125, supra; New Zealand, text accompanying nn. 262-265, supra; United States, text accompanying n. 9, supra.

[472] See Australia, text accompanying nn. 108-112, supra.

[473] See New Zealand, text accompanying nn. 256-260, supra.

[474] See United Kingdom, text accompanying nn. 293-296, supra.

[475] See United States, text accompanying n. 426 et seq., supra.

[476]See Australia, text accompanying nn. 72-85, supra; New Zealand, text accompanying nn. 226-228, supra. In the United States, the treble damage provision of the antitrust laws constitutes a "fee-shifting" statute, which alters the traditional American rule that each party must bear its own costs. Under s. 4 of the Clayton Act, a successful treble damage plaintiff may recover "the cost of suit, including a reasonable attorney's fee." A successful defendant, however, cannot shift its costs to the treble damage plaintiff.

[477] It seems noteworthy that in Australia, the costs indemnity rule is viewed as an inefficient mechanism for filtering out unmeritorious, vexatious or frivolous litigation. The Australian Law Reform Commission regards that task as better handled by case management and other procedural controls. Interestingly, in both Australia and New Zealand, the competition authorities are subject to the same costs indemnity rule as private parties. See Australia, n. 73 & text accompanying n. 86, supra; New Zealand, text accompanying nn. 229-233, supra.

[478] Australia, text accompanying nn. 37-41; 87-88, supra.

[479] See New Zealand, text between nn. 154-155, supra.

[480]) See id., text accompanying nn. 188-204, supra.

[481] See id., text accompanying nn. 177-181, supra.

[482] See id., text accompanying nn. 196-198, supra.

[483] See id., text accompanying nn. 178-181, supra.

[484] See id., text accompanying n. 201, supra. See also, United States, text accompanying nn. 376-389, supra.

[485] See Australia, text accompanying nn. 89-93, supra; see also New Zealand, text accompanying nn. 236- 240, supra.

[486] See United States, text accompanying nn. 416-418, supra.

[487] See Australia, text accompanying n. 99, supra.

[488] See New Zealand, text accompanying nn. 248-250, supra.

[489] In New Zealand, the Cabinet Economic Committee observed, "In evaluating options to strengthen incentives [to private enforcement] it is critical to strike the right balance between the remedies being too weak to achieve effective deterrence on the one hand, and being too attractive or strong so that private enforcement is used strategically for anti-competitive purposes on the other." Paper 3, Reforming Remedies, at 1.

[490] See Australia, n. 6, supra.

[491] Paper 3, Reforming Remedies, supra, n. 136, at 3, paras. 16-17.

[492] See United States, text accompanying nn. 338-347, supra.

[493] See Australia, text accompanying nn. 109-116; United Kingdom, text accompanying nn. 293-295; United States, text accompanying nn. 434-435, supra.

[494] See Australia, text accompanying nn. 117-118, supra; United Kingdom, text accompanying n. 296, supra; United States, text accompanying nn. 434-435 , supra.

[495] See New Zealand, text accompanying n. 176, supra.

[496] See Ireland, text accompanying nn. 303-307, supra.

[497] See New Zealand, text accompanying n. 198, supra. It is interesting to note from Table 5, above, that every jurisdiction in the study either considered or adopted a cease and desist order power. See Australia, text accompanying nn.65-66, supra; Ireland, text accompanying n. 308, supra.

[498] Pending the issuance of an order or an order becoming final, however, the Federal Trade Commission can obtain temporary restraining orders and interim injunctions enjoining the violation. See United States, text accompanying nn. 387-388, supra.

[499] It will be recalled that for, inter alia, this reason, the Commerce Commission initially opposed being granted the power to issue cease and desist orders. See text accompanying nn.199-204, supra.

[500] See Australia, text accompanying n. 25, supra; New Zealand, text accompanying n. 176, supra.

[501] See United States, text accompanying n. 406, supra.

[502] See Australia, text accompanying nn. 126-129, supra.

[503] See New Zealand, text accompanying nn. 266-267.

Table of Contents

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